

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SODEXHO USA, INC. : DECISION
for Revision of a Determination or for Refund of : DTA NOs. 820020,
Sales and Use Taxes under Articles 28 and 29 of the : 820021, 820022,
Tax Law for the Period March 1, 1998 through : 820023 and 820024
February 29, 2000. :
:

In the Matter of the Petition :
of :
SODEXHO OPERATIONS, 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 Period December 1, 1999 through :
November 30, 2002. :

In the Matter of the Petition :
of :
SODEXHO MANAGEMENT, INC. :
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, 1999 through :
November 30, 2002. :

Petitioners Sodexho USA, Inc., Sodexho Operations, LLC, and Sodexho Management,

Inc., all having an address of 10 Earhart Drive, Williamsville,¹ New York 14221-7078 and the Division of Taxation filed an exception to the determination of the Administrative Law Judge issued March 30, 2006. Petitioners appeared by McDermott, Will & Emery LLC (Arthur R. Rosen, Esq. and Karen S. Dean, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. Petitioners filed a brief in opposition to the Division of Taxation's exception and a reply brief. The Division of Taxation filed a reply brief. Oral argument, at the request of the parties, was held on May 21, 2007 in New York, New York.

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

ISSUES

I. Whether petitioners' purchases of non-food items were exempt from sales and use taxes because they were procured as agents of tax exempt entities or because they were purchased for resale to their tax exempt client.

II. Whether the Division of Taxation is estopped from assessing sales and use taxes.

FINDINGS OF FACT²

We find the facts as determined by the Administrative Law Judge except for findings of

¹This is the correct address. Petitioners' exception points out that an incorrect address was used in the determination.

²Petitioners have requested various changes to the findings, and have submitted proposed findings of fact. With the exception of finding of fact "52," we have rejected petitioners' requested findings since they are variously unsupported by the record or argumentative.

fact "27," "52," "60" and "61" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner Sodexo Operations LLC ("Sodexo Operations") is organized as a Delaware limited liability company with its principal office in Gaithersburg, Maryland. Petitioner Sodexo USA, Inc. ("Sodexo USA") was merged with petitioner Sodexo Operations in 2000. Before that time, Sodexo USA was organized as a Massachusetts corporation with its principal office in Gaithersburg, Maryland. Petitioner Sodexo Management, Inc. ("Sodexo Management") is organized as a New York corporation with its principal office in Gaithersburg, Maryland. Petitioners are the successors to various entities that had contractual relationships with tax exempt clients during the relevant audit periods.³

2. The Division of Taxation ("Division") issued Notice of Determination L-021426296-8 dated August 29, 2002 to petitioner Sodexo USA seeking additional tax due of \$5,116.00 and interest of \$1,572.92 for a balance due of \$6,688.92 for the audit period March 1, 1998 through February 29, 2000.

3. The Division issued Notice of Determination L-022947802-6, dated August 28, 2003, to petitioner Sodexo Operations seeking additional tax of \$31,125.02 and interest of \$4,667.04 for the period December 1, 1999 through November 30, 2002. The Division also issued Notice of Determination L-022947801-7 dated August 29, 2003 to petitioner Sodexo Operations seeking additional tax of \$102,298.25 and interest of \$13,981.71, less credits or payments of

³ Sodexo Operations is the successor in interest to Sodexo USA, Inc., Sodexo Services, Inc. and The Seiler Corporation. Petitioner Sodexo Management is the successor by name change only to Sodexo Marriott Management, Inc., Marriott Management Services Corp., and Saga Corporation. In addition, Sodexo Management is the sole member of Sodexo America, LLC.

\$112,400.35, for a balance due of \$3,879.61 for the audit period December 1, 1999 through November 30, 2002.

4. The Division issued Notice of Determination L-023578537-7 dated March 12, 2004 to petitioner Sodexo Management seeking additional tax of \$357,014.54 and interest of \$73,671.15 for a balance due of \$430,685.69 for the period September 1, 1999 through November 30, 2002. The Division also issued Notice of Determination L-023578538-6 dated March 15, 2004 to petitioner Sodexo Management seeking additional tax due of \$1,151,183.57 and interest of \$240,367.73, less credits or payments of \$825,304.78, for a balance due of \$566,246.52 for the period September 1, 1999 through November 30, 2002.

5. Sodexo USA is protesting the entire Notice of Determination issued to it.

6. Sodexo Operations is protesting \$13,722.00 of the total amount of tax sought in the notices of determination issued to it. Sodexo Operations filed a timely claim for refund relating to overpayments of tax on expense purchases, which was disallowed by the Division. Sodexo Operations is protesting \$3,279.00 of the disallowed refund that relates to the tax exempt clients.

7. Sodexo Management is protesting \$343,468.00 of the total amount of tax sought in the Sodexo Management notices of determination. Sodexo Management filed a timely claim for refund relating to overpayments of tax on expense purchases, which was disallowed by the Division. Sodexo Management is protesting \$108,134.00 of the disallowed refund that relates to the tax exempt clients.

8. During their respective audit periods, petitioners, or their predecessors, were engaged in the business of providing food and facilities management services to nonprofit hospitals, healthcare facilities and educational institutions, as well as to certain for-profit clients.

Petitioners' predecessors offered their clients the same types of services that are provided by petitioners. Petitioners, and their predecessors, each conducted business in New York State.

9. Petitioners provided two types of services: full-service contracts and management contracts.

10. In a full-service contract, petitioners assume responsibility for operating all of the client's food or facility functions. Specifically, petitioners provide all of the employees to manage and perform the food or facilities operations located at the tax exempt clients' facilities.

11. In a management contract, petitioners provide a layer of management employees to facilitate the tax exempt clients' food or facilities operations that are performed by the tax exempt client's employees.

12. Management contracts can be viewed as having two components: (1) the management of the hourly employees employed by the clients who physically perform the food and facility functions; and (2) the management of the procurement of food and non-food items for use in the clients' food or facilities operations.

13. Petitioners entered into management agreements to provide management services to certain tax exempt clients. The tax exempt clients were exempt organizations for purposes of sales and use taxes pursuant to Tax Law § 1116. The tax exempt clients would not be liable for sales and use tax had the tax exempt clients directly purchased the non-food items that are the subject of the notices of determination relating to the agency issue and the resale issue.

Petitioners' Food Management Services: The Lenox Hill Arrangement⁴

14. During the period in issue, the Lenox Hill arrangement was governed by the terms and conditions of the contract dated January 1, 1997 and the contract dated July 31, 2000.

15. The Lenox Hill nutrition services department is responsible for the preparation, service, and sale of food, beverages, merchandise, and other items at Lenox Hill Hospital that relate to patient food and nutrition service, retail cafeteria operations and vending machine services.

16. The Lenox Hill arrangement was based on a management contract pursuant to which Sodexo was hired to provide management employees to supervise Lenox Hill's nutrition services department. The contracts expressly appointed petitioners as an agent of Lenox Hill with respect to the management of the nutrition services department. Under the contracts, Sodexo was required to "manage and operate" the following patient services for Lenox Hill: purchasing and production services, patient food and tray services and clinical dietetic services. Sodexo was also required to "manage and operate" the cafeteria services and special functions and catering services for Lenox Hill. Petitioners are contesting only the portion of the

⁴ Petitioners and the Division have stipulated that the terms and language contained in the agreements between Sodexo Management and Lenox Hill (the "Lenox Hill arrangement") are representative of the terms and language contained in all of the contracts governing the arrangements between petitioners and the tax exempt clients to whom petitioners provided food management services. The Division and petitioners have also stipulated that the determination of the Division of Tax Appeals concerning the agency issue and the resale issue based on the contractual terms and the evidence presented with respect to the Lenox Hill arrangement will control the resolution of the contested portions of the notices of determination of each petitioner that relate to food management services provided to petitioner tax exempt clients.

assessments that relate to purchases of non-food items for use by Lenox Hill in their patient food service and retail cafeteria operations.⁵

17. Pursuant to the management contract arrangement with Lenox Hill, petitioners provided management and professional employees to manage the nutritional services operations including: the director of food and nutrition services, the clinical nutrition manager, an assistant director of operations, an assistant director for patient services, two cafeteria managers, a patient services manager, the clinical nutritionist and an administrative assistant.

18. After a recommendation was made by Sodexho, Lenox Hill made the final decision over which Sodexho management employees were placed on-site in the nutrition services department, including which general manager should be the department head of the nutrition services management. If Lenox Hill became unhappy with Sodexho employees, Lenox Hill had the right to request that the situation be addressed or that the employee be removed from Lenox Hill. The control that Lenox Hill exercised over Sodexho's on-site management employees was comparable to the control that Lenox Hill exercised over its own employees. All Sodexho employees placed on-site at Lenox Hill were required to attend Lenox Hill's hospital orientation and other Lenox Hill training programs.

19. Sodexho's on-site general manager, Tom Dooley, was the Director of Nutrition Services. Mr. Dooley functioned, and was recognized by Lenox Hill, as a department head within Lenox Hill. The other Sodexho employees on-site at Lenox Hill were management employees who reported to Mr. Dooley. Those Sodexho employees were responsible for

⁵ Under the terms of the contracts, Sodexho provided the vending services and was responsible for managing and stocking the machines. The contested portions of the assessments do not relate to items sold in the vending machines.

supervising various aspects of Lenox Hill's food service operations, including managing the Lenox Hill employees who performed the patient food service operations and retail service cafeteria operations, and managing the clinical dieticians.

20. Lenox Hill employed all of the non-management, hourly employees who actually performed all of the day-to-day operations of Lenox Hill's patient food service and cafeteria operations of Lenox Hill's nutrition services department. These Lenox Hill hourly employees were unionized workers.

21. Under the terms of the union contract, petitioners were not permitted to perform any functions performed by a union employee except in an emergency or training situation. Sodexo employees did not physically perform the day-to-day operations of the nutrition services department.

22. Lenox Hill furnished and maintained the premises where the patient food service and cafeteria operations of the nutrition services department were performed, including office space and kitchen facilities. Lenox Hill also owned, provided, and maintained all of the equipment, including all of the kitchen equipment, used by its nutrition services employees in the performance of the patient food service and cafeteria operations.

23. Lenox Hill's policies governed all aspects of the operations of the nutrition services department and Sodexo employees were required to manage the department in accordance with those policies. Sodexo was required to manage the nutrition services department in a manner that complied with the regulations imposed by the Joint Commission on Accreditation of Healthcare Organizations to which Lenox Hill was required to adhere.

24. Lenox Hill decided all aspects of the performance of the nutrition services operations, including choosing the menu items that were to be served to the patients and to patrons of the cafeteria, determining the quantity and quality of food to be served, setting the prices of the meals and other items served, and deciding on the hours of cafeteria operation and the times when patient meals were to be served. Before Lenox Hill made its decisions on the foregoing items, Sodexho recommended the recipes and production methods.

25. Lenox Hill's policies governed all aspects of Sodexho's management of the Lenox Hill nutrition services department employees, including Lenox Hill's human resources policies governing the hiring and discipline of nutrition department employees. Sodexho's role in the hiring of Lenox Hill's nutrition services employees consisted of interviewing the candidates screened by Lenox Hill's human resources department and making recommendations as to whom should be hired. Lenox Hill made the ultimate hiring and other human resource decisions concerning the nutrition services hourly employees and any nutrition services department management employees employed by Lenox Hill.

26. Lenox Hill set and administered the overall budget for the nutrition services department. Sodexho's role was to "maintain" the budget.

We modify finding of fact "27" of the Administrative Law Judge's determination to read as follows:

27. Sodexho was required to ensure that a minimum of 80 percent of the food and non-food items used by Lenox Hill in the performance of the food service operations were acquired from vendors affiliated with Premier, a group purchasing organization ("GPO") in which Lenox Hill participated through Greater New York Hospital. The Premier GPO arrangement provided the basis of the Purchasing Guidelines that were followed by the nutrition services department. Said guidelines provided that only Premier/Sodexho-approved suppliers were permitted

to be utilized. Lenox Hill could not require Sedexho to purchase products from non-Sodexho approved vendors.⁶

28. The quantity of food and non-food supplies, including the items at issue, needed for use in the operations of the nutrition services department was determined based upon the volume of meals served, which was determined by the number of patients. However, authorized usage guidelines were established by the district manager who was a Sodexho employee.

29. A Lenox Hill employee, typically its purchasing agent, placed orders for the food or non-food items and supplies by phone. To the extent at issue here, the items purchased included plastic utensils, paper supplies and cleaning agents used in conducting food service operations. The vendors were provided with Lenox Hill's exemption certificate.

30. Once the food and non-food items were ordered, the vendors delivered the items to Lenox Hill's loading dock. The items were received and checked in by Lenox Hill employees and then placed into storage facilities at the hospital owned by Lenox Hill by a storeroom clerk employed by Lenox Hill. Lenox Hill owned all of the inventories of smallwares,⁷ food beverages and other supplies used in the patient food service and cafeteria operations.

31. When it was time for the items to be used in the performance of the food service operations, Lenox Hill employees retrieved them from storage. The items were then used by the Lenox Hill union employees to prepare and cook the food for delivery to the patients or to the cafeteria.

⁶We have modified finding of fact "27" to more fully reflect the record.

⁷ Smallwares include items such as dishware, glassware, flatware, utensils, pots and pans.

32. Meals prepared for delivery to the patients were sent to the tray line where the trays for each patient were assembled with the meal, napkins and utensils. When the trays were completed, they were placed on a cart and taken upstairs to the patient floors where the meal trays were delivered to the patients. When the patients were through with the meal, the trays were picked up, placed back on the cart and returned to the kitchen where the trays were cleaned and set up for the next patient service. Throughout the process, all of the tasks were performed by Lenox Hill employees.

33. Meals intended for sale in the cafeteria were placed in serving vessels and then placed on the cart and taken on the elevator to the cafeteria. The meals were unloaded by the cafeteria workers and placed in the display stations. The meal items were served to the cafeteria patrons, who paid for the meals at the cafeteria registers operated by Lenox Hill employees. After the patrons were done with their meals, the used trays were picked up, placed back on the cart and returned to the kitchen where the trays were cleaned and set up for the next cafeteria delivery. Throughout this process, all tasks were performed by Lenox Hill employees.

34. Sodexho's role with respect to the purchases was the management of the purchasing activities and the management and coordination of the billings from the vendors. The vendor invoices for the purchased items were generally sent to Sodexho at the Lenox Hill facilities. The vendor invoices were all addressed to Sodexho and Lenox Hill. They were not addressed to Sodexho as an agent for Lenox Hill. Sodexho's on-site employees sent the vendor invoices to Sodexho's control center in Buffalo, New York. Upon receipt of the invoices, the Buffalo control center remitted payment for the purchased items to the vendors.

35. Under the terms of the contracts, Lenox Hill paid Sodexho a flat management fee to compensate Sodexho for the management of Lenox Hill's patient services operations and cafeteria operations.

36. The contracts required Sodexho to collect and deposit gross revenues from Lenox Hill patient food service and cafeteria services and then invoice Lenox Hill for "Operating expenses in excess of net cash receipts." Any excess net cash receipts from the cafeteria operations were credited to the operations costs of the patient food service. "Operating expenses" specifically included the cost of supplies, and the taxes thereon, used in the patient services and cafeteria operations. As a result of this arrangement, Sodexho was reimbursed dollar-for-dollar for the amounts that it had advanced for Lenox Hill's purchases.

37. Sodexho provided weekly "pre-bills" to Lenox Hill. For each aspect of the food service operations, that is, patient food service, cafeteria and vending, the pre-bill contained line-item breakdowns of the estimated fees and expenses for the next week including the management fee, estimated expenses and, for the cafeteria, the estimated credit for cash receipts collected. At the end of each month, Sodexho's accounting office reconciled the actual expenses incurred with the actual cash credits from the cafeteria services, plus amounts received from Lenox Hill in the payment of the pre-bills. In addition, Sodexho provided a monthly operating statement to Lenox Hill, which detailed the back-up information to the invoices sent to Lenox Hill showing the cash sales for the month, the outlays for purchases of food and supplies, and labor costs.

Petitioners' Facilities Management Services: The Burke Arrangement⁸

38. The Burke arrangement during the audit period was governed by the terms and conditions of the contract dated January 1, 1999, the amendment to the 1999 Burke contract dated June 25, 1999, the amendment to the Burke contract dated February 22, 2000, the amendment to the 1999 Burke contract dated January 3, 2001 and the amendment to the 1999 Burke contract dated December 7, 2001.

39. The Burke arrangement was a management contract pursuant to which petitioners provided management employees to supervise the housekeeping and laundry services of Burke's environmental services department. The contracts expressly appointed petitioners as Burke's agent with respect to the management of purchasing activities.

40. Under the contracts, Sodexo was required to "manage and operate" the housekeeping and laundry services at the Burke facilities, which were part of Burke's environmental services department. The environmental services department was responsible for housekeeping tasks such as cleaning and disinfecting the hospital premises, including stripping, waxing and burnishing corridors, cleaning patient rooms and sanitizing equipment. The department was not responsible for general maintenance tasks such as changing light bulbs or checking pipes or fans.

⁸ The Division and petitioners stipulated that the terms and language contained in the arrangements between petitioner Sodexo Management and Burke Rehabilitation Hospital (the "Burke Arrangement") are representative of the terms and language contained in all of the contracts governing the arrangements between petitioners and the tax exempt clients to whom petitioners provided facilities management services. The Division and petitioners have also stipulated that the determination of the Division of Tax Appeals concerning the agency issue and the resale issue based on the contractual terms and evidence presented with respect to the Burke arrangement will control the resolution of the contested portions of the notices of determination of each petitioner that relate to the facilities management services provided to petitioners' tax exempt clients. The terms "facilities management" and "environmental services" have been used interchangeably to describe the general housekeeping operations performed at the tax exempt clients' facilities. The term "facilities management" includes both environmental services, such as housekeeping, and engineering services, such as changing light bulbs or taking care of structural issues. At Burke, Sodexo's operations were limited to the management of Burke's environmental services operations, that is, the daily cleaning of the facility.

41. Pursuant to the management contract with Burke, Sodexho provided management and professional employees to manage the environmental services operations, including the general manager and the operations manager.

42. Burke had control over which Sodexho management employees were placed on-site in the environmental services department, including which general manager should be the department head of the environmental services department. Burke made the final decision after the general manager, an employee of Sodexho, screened for the best possible candidate. If Burke became unhappy with a Sodexho employee, Burke had the right to request that the situation be addressed or that the employee be removed from Burke.

43. Sodexho's general manager, David Schleissmann, supervised the management and function of Burke's environmental services department. Mr. Schleissmann functioned, and was recognized by Burke, as a department head within Burke. The only other Sodexho employee on-site at Burke was the operations director, who reported to Mr. Schleissmann and who was responsible for supervising the performance of the day-to-day housekeeping and laundry operations by Burke employees.

44. All of the hourly employees who performed the housekeeping services were employed by Burke. The actual performance of the environmental services operations was done by Burke's hourly employees. Sodexho employees did not physically perform the day-to-day operations of the environmental services department.

45. Burke provided and maintained the premises at which the housekeeping and laundry services were performed by Burke employees. Burke also owned and provided all of the equipment used in the performance of the housekeeping and laundry services.

46. Burke's policies governed all aspects of the operations of the environmental services department and Sodexo employees were required to manage the department in accordance with those policies. Sodexo was also required to manage the environmental services department in a manner that complied with the regulations imposed by the Joint Commission on Accreditation of Healthcare organizations to which Burke was required to adhere.

47. Burke dictated the areas of service for the environmental services department, that is, which of its facilities were to be cleaned, and the cleaning specifications for each area of service, including the type of tasks that the environmental services employees were to perform and how frequently these tasks were to be performed.

48. Burke's policies governed all aspects of Sodexo's management of the Burke environmental services department employees, including Burke's human resources policies governing the hiring and discipline of Burke's environmental services employees.

49. Sodexo's role in the hiring of Burke's environmental services employees consisted of interviewing the candidates screened by Burke's human resources department and making recommendations concerning which candidate should be hired. Upon a reasonable request by Sodexo's on-site managers, Burke, as the employer of the non-management environmental services employees, hired, discharged, or disciplined its employees. Burke made all of the ultimate hiring and other human resource decisions concerning the environmental services employees employed by Burke.

50. Burke set the overall budget for the environmental services department. Sodexo's role was to "administer" the budget.

51. The quantity of supplies, such as toiletry items, toilet tissue, cleaning products and germicides needed for use in the operations of the environmental services was determined based on the weekly inventory by a Burke supervisor of the stock on hand. On the basis of their management expertise, Sodexho told Burke the number of items to purchase, when to purchase the items and how the items were to be delivered. In furtherance of their duties, petitioners created a schedule which explained where the supplies should be sent within the hospital.

We modify finding of fact "52" of the Administrative Law Judge's determination to read as follows:

52. Orders were placed by a Burke supervisor with the vendors by phone. When Sodexho first took over, Burke was using Burke's vendors. Thereafter, Burke generally used Sodexho's vendors in order to save money. Sodexho had the right to approve any vendor that Burke wanted to use (Tr., p. 164). Burke could not require petitioners to purchase products from non-Sodexho approved vendors unless the vendors provided insurance and indemnity certificates to Sodexho (Exhibit "4"). When Sodexho became involved with Burke, the vendors were provided with Burke's exemption certificate.⁹

53. The vendors delivered the items directly to Burke's receiving area. The labels on the packages bore Burke's address, generally under the names of Sodexho and Burke. Once delivered, the items were received by Burke's receiving department and placed by Burke's receiving department employees into the storage facilities at the hospital owned by Burke. Burke owned all of the inventories and supplies used in the environmental services operations.

54. Sodexho's role with respect to the purchases was the management of the purchasing activities and the management and coordination of the billings from the vendors. The vendor invoices for the purchased items were generally sent to Sodexho at the Burke facilities. The

⁹ We have modified finding of fact "52" to more fully reflect the record.

invoices were all addressed to Sodexho and Burke. They were not addressed to Sodexho as an agent for Burke. All vendor invoices were sent by Sodexho's on-site employees to Sodexho's control center in Buffalo, New York. Upon receipt of the invoices, the Buffalo control center remitted payment for the purchased items to the vendors.

55. When it came time for the items to be used in Burke's environmental services operations, the items were requisitioned by one of the Burke supervisor employees and then distributed to the Burke hourly employees who actually used the items to perform the Burke environmental services operations.

56. Under the terms of the contracts, Burke paid Sodexho a flat management fee to compensate Sodexho for the management of Burke's housekeeping and laundry operations.

57. Pursuant to the contracts, Sodexho invoiced Burke for all operating expenses in connection with the housekeeping and laundry services. Operating expenses specifically included items purchased on behalf of the housekeeping and laundry services. As a result, Sodexho was reimbursed dollar-for-dollar for the amounts that it advanced for Burke's purchases.

58. Sodexho provided weekly pre-bills to Burke with a breakdown of estimated fees and expenses for the next week, including the management fee and the estimated expenses. At the end of each month, Sodexho's accounting office reconciled the actual expenses incurred with the amounts from Burke in payment of the pre-bills.

59. The terms of the contract specifically provided that, in the event sales and use taxes were assessed against items used in the environmental services operations, Burke was required to reimburse Sodexho for the assessment and any interest and penalties thereon.

Petitioners' Letter and The Division's Response

We modify finding of fact "60" of the Administrative Law Judge's determination to read as follows:

60. On or about November 11, 1992, petitioners' predecessor, Marriott Management Services Corp. ("MMS"), wrote a letter to the Department of Taxation and Finance's Technical Services. This letter stated in pertinent part as follows:

Enclosed please find the following information regarding Marriott Management Services Corp. (Marriott), a food service management company doing business in the State of New York.

Marriott Management services has been contracted by an exempt organization to provide management services for the operation of the food service that provides patient meals and cafeteria facilities for the employees of the hospital and visitors.

Marriott purchases food and non-food supplies for resale to the exempt organization. . . .

Following contract terms support our resale claim:

1. All inventory is owned by the exempt organization, and as such, it is their expense to maintain and replace all inventory.
2. All food service equipment is owned by the exempt organization.
3. Marriott provides only management employees, all other employees are employees of the exempt organization.

Please advise us of the correct tax treatment of Marriott's purchases of food and non-food supplies (Exhibit "25").

By letter dated April 30, 1993, the Division advised MMS, in relevant part, as follows:

Given the facts as you described them in your letter, it is our opinion that M.M.S.'s purchases of food, non-food items . . . are all purchases made for resale since M.M.S. will bill the hospital for purchase of the tangible personal property When making tax exempt purchases for resale, the purchaser (M.M.S.) must provide the seller of the property or services with a properly completed "Resale Certificate" (Form ST-120, enclosed).

To qualify for the exemption, the purchaser and seller must both be registered New York State sales tax vendors. Of course, when M.M.S. bills the tax exempt hospital for the purchase of tangible personal property . . . , it would not charge the hospital sales tax since, as you say, the hospital is a tax exempt organization. However, unless the hospital is a Federal or New York State owned and operated institution, it must provide M.M.S. with a properly completed “Exempt Organization Certification” (ST-119-1, enclosed). . . .¹⁰

We modify finding of fact “61” of the Administrative Law Judge’s determination to read as follows:

61. Petitioners assert that on the basis of the Division’s letter of April 30, 1993, they did not accrue tax on items that met the criteria of the letter.¹¹

PROCEDURAL MATTERS

The issues remaining for resolution in this matter are whether petitioners purchased the non-food items as agents on behalf of their tax exempt clients, whether petitioners purchased non-food items for resale to tax exempt clients and, if not, whether the Division is estopped from assessing sales and use tax on petitioners’ purchases of non-food items.¹²

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Tax Law § 1105 provides, in general, that all retail sales of tangible personal property are subject to sales tax. Petitioners argued, however, that certain of their purchases were exempt

¹⁰We have modified finding of fact "60" to correct the date of letter of MMS and to more clearly set forth the facts in the finding.

¹¹We have modified finding of fact "61" to more accurately reflect the record.

¹²***PROCEDURAL MATTERS.*** Petitioners are contesting the notices of determination and denials of the refund claims only with respect to purchases of non-food items made pursuant to food management contracts and facilities management contracts with certain tax exempt clients. Prior to the hearing held in this matter on May 24, 2005 to May 26, 2005, the parties resolved certain portions of the contested assessments. The parties also stipulated that the notices of determination issued to Sodexo Operations and Sodexo Management would be revised in accordance with the stipulated resolution of the issue.

from tax because they were made as agents of tax exempt organizations. Petitioners drew a distinction between two distinct business arrangements. In one type of arrangement, Sodexho offered what it describes as full-service. In that situation, Sodexho would provide both the management employees and the employees who performed the actual work. For example, in order to provide a full food service, Sodexho employees performed the tasks of cooking, cutting and cleaning. In this situation, petitioners agreed that sales tax is due on their purchases of non-food supplies since they are consuming the supplies when they are performing the service.

In the instant matter, however, Sodexho provided only management personnel, and the actual work was performed by employees of their tax-exempt clients. Petitioners argued that in this situation where the purchases made by Sodexho were on behalf of the institutions and used by the institutions' employees, the purchases were exempt from tax because the items were purchased as an agent for the tax-exempt institutions.

The Administrative Law Judge noted a similar case where the taxpayer set up and managed food service facilities at educational and health care institutions which were exempt from tax. In general, the client provided the dining area and petitioners ran the entire food service operation including ordering, preparing and cleaning up the food. The Administrative Law Judge pointed out that in order to perform this task, the taxpayer provided trained food service managers who hired the individuals who worked in the dining halls. The taxpayer's invoices separately stated the costs of food, supplies, repairs, labor, payroll, other expenses and the taxpayer's fee. The taxpayer asserted that their purchases of plastic spoons and cups, paper supplies, napkins and cleaning products were exempt from sales tax because it was an agent for the tax-exempt clients (*Matter of Custom Mgt. Corp. v. State Tax Commn.*, 148 AD2d 919 [1989]). The

Administrative Law Judge followed the Court's holding in *Custom Management* and concluded from the record that petitioners' degree of control over the details of their food management services supported the conclusion that they were not acting as mere agents of their tax-exempt customers.

The Administrative Law Judge concluded that petitioners failed to establish that they were acting merely as agents of the tax-exempt institutions. Moreover, the Administrative Law Judge found petitioners' claim that the tax-exempt institutions were the purchasers of the non-food items not supported by the record.

Petitioners next argued that their purchases of the non-food items were excluded from tax as purchases for resale.

The Administrative Law Judge rejected this argument as also without merit, noting that the Court of Appeals has held that an item is purchased for resale, for purposes of Tax Law § 1101, when the purchaser acquires the item for the purpose of resale. Any resale which is purely incidental to the primary purpose of the business is not a purchase for resale as such.

Furthermore, the Administrative Law Judge noted, the regulations of the Commissioner of Taxation provide, in part, that:

Napkins, straws, stirrers, plastic knives, forks, spoons and other similar items are not purchased for resale as such nor are they packaging materials or components thereof. Purchases of these items by restaurants *and similar establishments* are not purchases for resale nor exempted from tax by paragraph (19) of section 1115(a) of the Tax Law and are subject to tax (20 NYCRR 528.20[d][2], emphasis added).

Here, the Administrative Law Judge found that since the recurring purchases were used in their service of managing a food service, the items were clearly not purchased for resale.

Similarly, the Administrative Law Judge determined that the items delivered to Burke were not purchases for resale as such. Rather, they were acquired as a part of a service. Sodexo was hired by Burke for their management expertise and to establish control over the supplies.

Next, petitioners argued that the Division should be estopped from assessing tax because they relied upon a letter issued by the Division on April 30, 1993.

The Administrative Law Judge pointed out that the Tax Appeals Tribunal has utilized a three-part test in order to determine whether to invoke estoppel. The test asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (*see, Matter of Consolidated Rail Corp., supra*).

The Administrative Law Judge found that the material facts in the matter at hand and the facts underlying the 1993 opinion letter are substantially identical.

Accordingly, the Administrative Law Judge found that all of the elements of estoppel are present, and that petitioners reasonably relied on the letter they received from the Division (*see, e.g., Matter of Bolkema Fuel Co.*, Tax Appeals Tribunal, March 4, 1993). Finally, the Administrative Law Judge found that petitioners suffered a detriment as a result of their reliance on the Division's letter since after being advised that the activity that they posited to the Division was not subject to tax, they did not have the option of accruing the tax or changing their business practice to avoid the imposition of the tax. Accordingly, the Administrative Law Judge found that the Division was estopped from assessing tax or denying a refund to the extent that the tax assessed or refund claimed was based upon the purchase of non-food items during the subject period.

ARGUMENTS ON EXCEPTION

The Division takes exception to the Administrative Law Judge's findings of fact relating to the letter from MMS dated November 11, 1992 (Exhibit "25"), and the Division's letter in response of April 30, 1993. The Division argues that the Administrative Law Judge's findings of fact "60" and "61" mischaracterized the contents of the letters, which, in turn, resulted in an erroneous granting of estoppel.

The Division points out that its letter of April 30, 1993, in response to MMS's letter of November 11, 1992, stated that when making purchases for resale, the purchaser (MMS) must provide its supplier with a properly completed resale certificate. In the absence of proof that it did so, the Division argues that petitioners cannot successfully argue that they relied on the guidance set forth in the Division's letter of April 30, 1993. The Division claims that petitioners could not have relied on the Division's letter if they were not issuing resale certificates to their suppliers as prescribed by that letter. This fact, the Division asserts, also militates against petitioners' claim that they relied on said letter for guidance in forming their tax policy.

The Division argues petitioners' position that it relied on the Division's letter is contradicted by petitioners' requests for refund. The Division questions petitioners' claim to have relied on a letter that stated their purchases were exempt from tax, yet petitioners claim a tax refund on taxes they accrued and paid.

Finally, the Division argues that petitioners have failed to demonstrate that they acted in reliance on the Division's letter to their detriment.

The Division agrees with so much of the Administrative Law Judge's determination as found that no agency relationship existed between petitioners and their clients. The Division also

requests that we affirm that portion of the Administrative Law Judge's determination that held that petitioners were not purchasing non-food items for resale to their clients.

Petitioners also filed an exception to the determination of the Administrative Law Judge. Petitioners argue that the Administrative Law Judge erroneously held that their purchases were not eligible for sales and use tax exemption as purchases made for resale. Petitioners also argue that the Administrative Law Judge erred in rejecting certain of their proposed findings of fact as argumentative.

Petitioners argue that the Administrative Law Judge erred in finding that they were not agents of their tax exempt clients. Petitioners state that whether an agency relationship exists must be determined based on the facts and circumstances between the parties. Petitioners urge that the facts here support the conclusion that they were agents for their tax exempt clients (*see*, 20 NYCRR § 529.7[h][2]).

Petitioners urge that the Tribunal follow the interpretation of agency as prescribed in *Matter of Hooper Holmes, Inc. v. Wetzler* (Tax Appeals Tribunal July 21, 1988) wherein it held that the petitioners were acting as agents for the subject tax exempt entities. In the alternative, petitioners ask that we find that their purchases of non-food items were excluded from tax as purchases for resale and exempt from tax. Petitioners state that they did not use the non-food items in the performance of management services and they request that we find that the tax exempt entities purchased the items from petitioners for use in their food service or housekeeping operations.

OPINION

We affirm in part, and reverse in part, the determination of the Administrative Law Judge. We first address whether petitioners' purchases of non-food items were for resale to their tax exempt clients.

Tax Law § 1105(a) imposes a sales tax upon the receipts from retail sales of tangible personal property with certain exceptions which are not germane. The term "retail sale" is defined as the sale of tangible personal property to any person for any purpose other than for resale (Tax Law § 1101[b][4][i][A]). An individual who purchases an item for the purpose of sale or rental, purchases it for resale within the meaning of the statute (*see, Matter of Albany Calcium Light Co. v. State Tax Commn.*, 44 NY2d 986 [1978]). In addition, in order to qualify for the resale exclusion, the tangible personal property must be purchased *exclusively* for the purpose of resale (*see, Matter of Micheli Contr. Corp. v. New York State Tax Commn.*, 109 AD2d 957 [1985]; *see also, Matter of Savemart, Inc. v. State Tax Commn.*, 105 AD2d 1001 [1984], *appeal dismissed* 64 NY2d 1039 [1985]). Tax Law § 1132(c) places the burden of proving that purchases are for resale upon the person claiming the same.

The terms "sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration" (20 NYCRR 526.7[a]). This regulation contemplates that each sale of tangible personal property shall consist of: (i) a consideration and (ii) a transfer of title or possession of the tangible personal property.

The Division's regulations regarding the resale exclusion provide:

- (1) Where a person, in the course of his business operations, purchases tangible personal property or services *which he intends* to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he

has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property . . . (20 NYCRR 526.6[c][1], [2] and [3], emphasis added).

Under the above regulations, for there to be a purchase and a resale there must be two transactions. First, the buyer “in the course of his business” makes a purchase of tangible personal property (pays consideration in exchange for the transfer of title or possession or both of tangible personal property) which he intends to sell to his customers. To avoid double taxation, the regulation does not require the buyer to pay sales tax to the vendor at this stage (20 NYCRR 526.6[c][3]). Second, when the tangible personal property is resold (i.e., title or possession or both is again transferred for a new consideration) to the customer, the regulation provides that this resale would be subject to sales tax (20 NYCRR 526.6[c][3]). Of course, if there were a resale here, there would be no tax imposed, because Lenox Hill and Burke are exempt from tax.

When petitioners purchase the non-food items under their contracts, they direct where the items are to be delivered to the tax exempt entities. The invoices sent to Sodexho at their clients locations are then sent by Sodexho’s employees to their offices in Buffalo, New York for payment. Petitioners are later reimbursed for the price of the non-food items dollar-for-dollar. Petitioners assert that these facts indicate that the non-food items purchased under the contracts with the tax exempt entities is purchased for resale and, therefore, not subject to tax. We disagree.

In *Matter of MGK Constructors* (Tax Appeals Tribunal, March 5, 1992), we addressed the issue of whether the purchases of guard services by a construction contractor pursuant to a contract with the City of New York were excluded from sales tax as purchases for resale. In that case, MGK had contracted with the City to build a water tunnel. MGK was required under the contract to provide guard services, and those guard services were used by MGK to protect the work site. In *MGK*, we emphasized that the contract with the City was for the construction of the water tunnel and *not* for the provision of guard services. Guard services were used by MGK at its work sites and this was just one of many expense items that MGK incurred as an incident to carrying out its contractual obligations with the City. We held that MGK's purchases of guard services were not made for the exclusive purpose of resale to the City.

Similarly, petitioners' purchases of non-food items were necessary for petitioners to carry out their management service contracts with Lenox Hill and Burke. Lenox Hill and Burke did not retain petitioners' services just to have a new middleman for purchases. Rather, petitioners were retained to manage their clients' nutritional service operations or laundry and housekeeping operations. Pursuant to carrying out their management functions, petitioners made these purchases for which they were later reimbursed dollar-for-dollar. However, reimbursement for a previous transaction does not constitute a "resale," because there is no new consideration or second transfer of title or possession (*see, West Valley Nuclear Servs. Co.*, Tax Appeals Tribunal, November 13, 1998, *confirmed* 264 AD2d 101 [2000], *lv denied* 95 NY2d 760 [2000]). We conclude that petitioners' purchases were incidental to carrying out their management service contracts with Lenox Hill and Burke. As such, petitioners' purchases of non-food items were not made exclusively for resale (*Matter of Micheli Contr. Corp. v. New*

York State Tax Commn., supra; Matter of Savemart, Inc. v. State Tax Commn., supra; Matter of AGL Welding Supply Co., supra), and we affirm the Administrative Law Judge on this issue.

Tax Law § 1116 makes provisions for certain organizations, like the hospitals in this matter, to be exempt from sales and use tax.

The Departments regulations (20 NYCRR 529.7[h]) provide with respect to sales to exempt organizations, in relevant part, as follows:

(h) *Sales to exempt organizations.* (1) Any sale . . . to or any use . . . by an exempt organization to which an exempt organization certificate has been issued is exempt from sales and use tax.

(2) In order to exercise its rights to exemption the organization must be the direct purchaser, occupant or patron of record. It must also be the direct payer of record and must furnish its vendors with a properly completed exempt organization certification. *Direct purchaser, occupant or patron* as used in this paragraph includes any agent or employee authorized by the organization to act on its behalf in making such purchases, provided the organization and its agent . . . are both identified on any bill or invoice. An organization is the direct payer of record where direct payment is made by the organization or from its funds directly to the vendor (emphasis in original).

The Division argues that petitioners cannot prevail here because they have failed to establish that they were acting as agents for their tax exempt clients. It is undisputed that exemption certificates from Lenox Hill and Burke were provided to the vendors in this matter. It is also clear from the contracts in the record that the tax exempt clients purported to retain petitioners to serve as their agent in the management of nutrition services and environmental services. Sodexho's name and the name of exempt clients appear on vendor invoices, however, the invoices are not billed to Sodexho, as agent.

Petitioners argue that the Administrative Law Judge improperly relied upon the Court's decision in *Matter of Custom Management Corp. v State Tax Commn. (supra)* in concluding

that Sodexho was not acting as an agent. In *Custom Management*, the taxpayer set up and managed food service facilities at educational and health care institutions which were exempt from tax. In that case, the taxpayer argued their purchases of plastic spoons and cups, paper supplies and cleaning products were exempt from sales tax because they were an agent of the tax exempt institutions.

In *Custom Management*, the Court stated:

"An agency is a fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act" (*Meese v. Miller*, 79 AD2d 237 [1981], 241; see, 2 NY Jur 2d, Agency, §1, at 470-471). We conclude from the record that petitioners' control over the details of its food management service supports the determination that it was not merely an agent for the tax-exempt entities. Indeed, it was specifically hired so that its institutional clients would be relieved of responsibility for running this service. Evidence that petitioners purchases the food and supplies, usually determines which vendors to use, performs the bookkeeping functions and generally places all the employees on its payroll supports respondent's determination. In sum, petitioners did not meet its burden of showing that it was acting solely on behalf of and subject to the control of its institutional clients (*Matter of Custom Management Corp. v. State Tax Commission, supra*, at 920).

According to petitioners, this case is distinguishable from *Custom Management*, because Sodexho only provides management level employees and not the hourly employees that actually do the work.

Contrary to Sodexho's argument, it is not the fact that Custom Management was a full service operation that was dispositive of the result in that case. It was Custom Management's level of control of the details in the food management service. We find the same kind of control present here.

Sodexho tells their tax exempt clients what supplies need to be purchased, where they are to be delivered and provides a schedule to their clients employees explaining where these items

need to be distributed within the facility. Sodexho claims they are acting as agents, yet their tax exempt clients cannot force Sodexho to use a particular vendor. If the tax exempt client is unhappy with a Sodexho manager, it cannot simply direct his removal or initiate discipline. Sodexho performs the bookkeeping functions and pays the vendors for the non-food items purchased. While Lenox Hill and Burke set the policy parameters and budgets within which petitioners must operate, it is petitioners that manage the employees in the day-to-day operations of the nutritional services and sanitation services. While Lenox Hill makes the final decision in hiring nutrition service employees, it can do so only after the potential employee has been screened, interviewed and recommended by petitioners. Once Sodexho, as part of their management function, determine which non-food items need to be purchased, they direct Lenox Hill's purchasing agent to place the order. The items are delivered directly to the hospital and distributed by Lenox Hill employees within a facility as decided by Sodexho managers. This degree of independent discretion and control militates against a finding that petitioners acted merely as agents.

Invoices from vendors, as already noted, are sent to Sodexho at the Lenox Hill or Burke address, and then forwarded by a Sodexho employee to Sodexho's office in Buffalo, New York for payment.¹³ Sodexho pays the invoices and is reimbursed dollar-for-dollar for its expenditures. We agree with the Administrative Law Judge that petitioners, not the tax exempt entities, are the purchasers of record. We also note that the Department's regulation provides that an organization is the direct payer of record where direct payment is made by the exempt

¹³ In *Matter of Seiler Corp.* (State Tax Commn., Sept. 13, 1985) it was observed that while the invoices included the name of both the hospital and the petitioners, such information would, of necessity, be included for purposes of delivery.

organization or from its funds directly to the vendor (*see*, 20 NYCRR 529.7[h][2]). The dollar-for-dollar reimbursement for amounts expended plus the flat management fee that both tax exempt clients pay petitioners do not appear consistent with this regulation.

In addition, as part of its management function, Sodexo exercised significant influence over which vendors to use. Although individuals in the respective hospitals' purchasing departments contacted the vendors, the record shows that Sodexo managed and directed all purchasing activity and coordinated the billing process with the respective vendors. The Lenox Hill purchasing guidelines show that items were to be purchased according to purchasing agreements where it was to Sodexo's overall advantage to do so and only Premier/Sodexo-approved suppliers were to be utilized with respect to nutritional product supplies. Similarly, after Sodexo was retained, Burke began using Sodexo-approved vendors.

Sodexo performed bookkeeping functions for their clients through their furnishing of a pre-bill procedure which outlined estimated cash, credit for cash from the cafeteria, the management fee and estimated expenses.

Petitioners are correct that the *Custom Management* case is different; the taxpayers in this matter did not place the employees on their payroll. However, the point is not whether Sodexo employed the hourly employees. It is the degree of control they exercised with respect to the overall nutrition services operation, including those employees they did not employ but managed. On this point, it is clear that Sodexo had significant input regarding the hiring of a particular employee. For example, the record shows that the Lenox Hill human resources department did the initial screening of the job applicants. If an applicant passed the initial screening, the applicant was sent to Sodexo for an interview. If Sodexo approved the person,

they would recommend that Lenox Hill hire the individual. One can reasonably infer that an individual that was not interviewed and not recommended by Sodexho would not be hired. Sodexho exercised similar influence over the hiring practices at Burke. Furthermore, in each institution, Sodexho management supervised the employees of the client. The fact that Sodexho did not pay the salary of the hourly employees seems less significant for the purposes of inquiry than the fact that Sodexho managed them and thereby directed their activities.

On the basis of the foregoing, we conclude that petitioners have not established that they were merely agents of the tax-exempt institutions and we reject petitioners' claim that it was proper to rely upon the tax-exempt status of their clients to exempt their purchases from taxation. Under the circumstances, the factors cited by petitioners regarding the agency provisions in the contracts are less significant than the actual conduct of the parties in carrying out the contract. Thus, we affirm the Administrative Law Judge on this issue for the reasons in his determination.

We next address whether petitioners were entitled to estoppel against the Division. The doctrine of estoppel, while it may be invoked against a government agency, is done sparingly (*see, Matter of Wolfram v. Abbey*, 55 AD2d 700 [1976]; *Matter of Sheppard-Pollack, Inc. v. Tully*, 64 AD2d 296 [1978]), especially when the governmental agency involved is charged with the administration of taxes (*Matter of Turner Constr. Co. v. State Tax Commn.*, 57 AD2d 201 [1977]; *see also, Matter of Moog, Inc. v. Tully*, 105 AD2d 982 [1984]). Estoppel may be invoked against such an agency based only on exceptional circumstances (*Schuster v. Commissioner*, 312 F2d 311 [1962]). The doctrine applies to positive acts as well as omissions when there was a demonstrated duty to act (*Boeckmann & Assocs. v. Hempstead*, 207 AD2d 773 [1994]).

We have embraced a three-part test to determine applicability of the doctrine to specific cases (*see, Matter of Consolidated Rail Corp.*, Tax Appeals Tribunal, August 24, 1995, *confirmed*, 231 AD2d 140 [1997], *appeal dismissed* 91 NY2d 848 [1997]). First, it must be determined whether the Division made a representation to a petitioner or neglected to perform an act, which it had a legal duty to perform. Second, we must decide whether the taxpayer reasonably relied upon the Division's representation or omission and, lastly, whether such reliance was to the detriment of the taxpayer (*see, Matter of West Valley Nuclear Servs. Co., supra; Matter of Harry's Exxon Serv. Sta.*, Tax Appeals Tribunal, December 6, 1988).

In this case, the Division wrote a letter dated April 30, 1993 to MMS, petitioners' predecessor. The Division's letter was in response to an earlier letter from MMS. The letter from MMS stated that it was making purchases for resale to tax exempt entities and asked how such purchases should be treated for sales tax purposes. The Division's letter in reply stated that *based on MMS's representations* that its purchases were for resale, the Division did not view such purchases as subject to sales tax.

Petitioners assert that as a result of this exchange, they relied on the Division's statement that the purchases were not subject to tax and changed its policies so as not, generally, to pay tax on their purchases. Petitioners also claim they suffered a detriment as a result of their reliance on the Division's April 30, 1993 letter. The alleged detriment suffered by petitioners was their failure to accrue and pay sales tax on their purchases of non-food items.¹⁴

The letter from MMS said that it was making purchases for resale. The Division responded that "Given the facts as you described them in your letter, it is our opinion that

¹⁴There is some suggestion that petitioners acquired new customers that they would not have otherwise acquired, but for the fact that they were not charging sales tax to their customers.

M.M.S.'s purchases of food, non-food items . . . are all purchases made for resale . . ." and no tax would be due (Ex. "24"). Unfortunately for petitioners, the actual facts were not as described in the letter because petitioners were not reselling the items. Now, petitioners would have us believe that they were misled by the Division's letter into not accruing tax and not paying taxes. However, the Division's letter merely confirms that if petitioners were making purchases for resale, they would not be subject to tax. Petitioners were not, in fact, reselling the items, so that premise is a nullity. Assuming, *arguendo*, that the Division's letter was relied upon by petitioners, there existed certain instances wherein petitioners continued to collect and accrue sales tax (for which they now seek a refund). We do not view this as the kind of exceptional circumstances or the kind of detriment that would justify invoking the remedy of estoppel. Indeed, to the extent that detriment was suffered here, it appears to have been self-inflicted (*cf.*, *Matter of Harry's Exxon Serv. Sta., supra* [wherein the taxpayer's records were destroyed in reliance on a letter from the Division rendering him unable to defend against an assessment of tax]). Furthermore, we have held that petitioners were not purchasing for resale and were not in fact reselling the non-food items, so it would be counter intuitive to find that they had relied on the Division's letter. We conclude that the doctrine of estoppel does not apply against the Division under these facts and, as such, we reverse the Administrative Law Judge on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sodexho, USA, Inc., Sodexho Operations, LLC and Sodexho Management, Inc. is denied;
2. The exception of the Division of Taxation is granted;

3. The determination of the Administrative Law Judge is reversed in accordance with paragraph "2" above, but is otherwise affirmed;

4. The petitions of Sodexo USA, Inc., Sodexo Operations, LLC and Sodexo Management, Inc. are denied; and

5. The notices of determination and denial of claims for refund are sustained.

DATED: Troy, New York
November 21, 2007

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

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

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