

NEW YORK STATE

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	DETERMINATION
MARRIOTT INTERNATIONAL, INC. ET AL. ¹	:	DTA NOS. 821078,
for Revision of Determinations or for Refund of Sales and	:	821079, 821080, 821219,
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	821374, 821375, 821376,
Period September 1, 2000 through February 28, 2007.	:	821380, 821381, 821382,
	:	821383, 821384, 821385
	:	AND 821753

Petitioners, Marriott International, Inc. et al., filed petitions for revisions of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2000 through February 28, 2007.

Petitioners, by their representatives, Hodgson Russ, LLP (Timothy P. Noonan, Esq., and Mark S. Klein, Esq., of counsel) and the Division of Taxation, by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., of counsel), waived a hearing and agreed to submit the matter for a determination based on documents and briefs to be submitted by June 2, 2008, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

¹ This matter involves 14 petitioners who have been consolidated for determination. For a list of the petitioners, see the appendix.

ISSUE

Whether the reimbursements paid or credited to petitioners from Marriott Rewards were consideration for hotel occupancy subject to sales tax pursuant to Tax Law § 1105(e).

FINDINGS OF FACT

Petitioners, (Marriott International, Inc. et al.) and the Division of Taxation (Division) submitted proposed findings of fact which have been accepted and incorporated herein as follows:

1. Petitioners own or operate hotels, and are engaged in the rental of hotel rooms in New York State. Petitioners had or have a contractual relationship with Marriott Rewards, Inc., and Marriott Rewards LLC (hereafter Marriott Rewards) to participate in a marketing program operated by Marriott Rewards known as the Marriott Rewards Program.²

2. Until January 2004, the Marriott Rewards Program was operated by Marriott Rewards, Inc., a wholly owned subsidiary of Marriott International. Marriott Rewards LLC, wholly owned by Marriott Rewards, Inc., was formed in 2003 and has operated the Marriott Rewards Program since January 2004.

3. Marriott Rewards operates a frequent stay program designed to reward members who stay at participating Marriott hotels. Each of the hotels is a legal entity distinct from Marriott Rewards. The program is designed to increase lodging at participating hotels by offering points to program members for staying at the hotels. Given the development of similar programs by other hotels in the industry, programs like this are now viewed by Marriott Rewards as

² There are eleven petitioners in this matter, ten of which, own or operate hotels. Marriott Rewards is also a petitioner in this matter, but for purposes of these proceedings, the parties have stipulated that refund amounts will be payable to the hotels in the event the petitions are granted. Therefore, a reference to petitioners relates to the ten petitioners who own or operate hotels.

prerequisites from a marketing perspective, and industry customers have come to expect these types of programs.

4. Some hotels benefit more than others from participating in Marriott Rewards. Marriott lodgings in Hawaii and Florida, for example, are particularly popular, as are the Marriott Marquis and the Marriott East Side in New York City. Guests would probably stay in these hotels regardless of whether they earn points. Less popular lodgings that provide fewer free rooms, like the Brooklyn Marriott, benefit more from participating in Marriott Rewards, in the sense that fewer guests would stay there but for the opportunity to earn points.

5. Internally, Marriott Rewards is referred to as a “zero sum game.” It is not designed to make a profit, nor does it make a profit; inflows must equal outflows. Funding received by the program during a particular year represents the operating costs of the program, cost of the awards redeemed during the year, and the provision for the liability for outstanding points that will be redeemed for awards in the future.

6. Individuals may enroll as members in the Marriott Rewards Program online, by calling the Marriott Guest Service Center, or by applying at a hotel that participates in the program. There is no fee to join or remain a Marriott Rewards Program member.

7. Marriott International, Inc., either owns the hotels or holds the franchise rights (i.e., as the franchisor) for the hotels participating in the Marriott Rewards Program. Marriott Rewards does not own the hotels or hold the franchise rights for any of the hotels participating in the Marriott Rewards Program.³

³ Marriott International also operated the Rihga Royal Hotel, which is why it is one of the petitioners in this matter.

8. The following classes of Marriott franchises participate in the Marriott Rewards Program: Marriott Hotels & Resorts, JW Marriott Hotels & Resorts, Renaissance Hotels and Resorts, Courtyard by Marriott, Residence Inn by Marriott, Fairfield Inn by Marriott, TownPlace Suites by Marriott, SpringHill Suites by Marriott and Marriott Vacation Club International and Marriott Conference Centers. All classes of Marriotts are required to participate in the Marriott Rewards Program, and the terms of the program are governed by a 1998 Participation Agreement which was amended in January 2004.

9. The Participation Agreement is a contract between Marriott Rewards and the participating hotels. Under the Participation Agreement, it is indicated that Marriott Rewards desires that the Marriott Brand Hotels, i.e., the petitioners here, participate in the program, which is described as a “marketing program” in the agreement. Section 1.1 of the agreement provides that the Marriott Brand Hotels “shall participate in the Program.” This section also provides that “Marriott Rewards Members will earn points in Marriott Rewards through their patronage of the Participating Hotels and Participating Hotels will provide discounted room nights to be used as award redemptions in Marriott Rewards [Program].”

10. Marriott Rewards members earn points in Marriott Rewards through their patronage of the participating hotels. Most points are issued as a result of hotel stays. Although the percentage varies slightly from year-to-year, an average of 78% of all points are issued to members for hotel stays in participating Marriott hotels. Members can purchase points by paying Marriott Rewards cash or can acquire them from Marriott Rewards Partners who have paid Marriott Rewards for the points. Marriott Rewards does not collect sales tax on points it sells to members for cash.

11. The primary Marriott Rewards “partners” are credit card companies and airlines. Marriott Rewards sell points to these partners who then issue the points to their customers. The points issued by airlines and credit card companies can be redeemed for stays at participating hotels. Marriott Rewards does not collect sales tax on the sale of points to the airlines or credit card companies.

12. Marriott Rewards can terminate its points program at any time. Points can be forfeited and points do not constitute property of the member. Marriott Rewards sets the value of the points, e.g., it determines how many points must be redeemed to acquire hotel occupancy.

13. At most hotels, members earn points for each \$1.00 spent at the hotel. Fewer points are earned for dollars spent at properties that generally cater to longer-term accommodations, such as Residence Inn, TownePlace Suites, & Horizons by Marriott Vacation Club International. The points a member earns for a hotel stay depend on the class of hotel providing the lodging. Stays at some classes of hotels only generate points based on a room rate, while stays at other classes of hotels generate points based on room rate, tax and incidentals.

14. When a member purchases a stay at a participating hotel located in New York, the hotel collects and remits full New York State and local taxes on the total rents received pursuant to Tax Law § 1105(e) unless the member’s occupancy is exempt from sales tax.

15. Under the terms of the Marriott Rewards Program, each time a member stays at a participating hotel, the hotel is required to pay to Marriott Rewards (referred to as the Central Fund) approximately 4.5% (or some other agreed-upon percentage) of the total hotel folio (hereafter referred to as the Contribution Calculation) generated by the member. For purposes of the Contribution Calculation, the hotel folio includes the room rate, all taxes and all incidental fees billed to members.

16. Petitioners do not actually contribute 4.5% of the member's hotel folio to Marriott Rewards each time a member purchases a stay at a hotel. Instead, pursuant to the Contribution Calculation, petitioners are required to determine the amount of the total contributions payable to Marriott Rewards for all qualifying member stays at its hotel on a periodic basis, 13 times a year (hereafter referred to as the reporting periods).

17. The Participating Hotels remit the funds due under the Participation Agreement to Marriott Rewards, which does not hold the monies as agent or fiduciary for the Participating Hotels.

18. Marriott Rewards Program members and nonmembers pay the same price for the same room when staying at a participating hotel, and a patron's status as a member in the Rewards Program does not affect the sales tax collected from the member for stays at participating New York Hotels. However, each of the hotels treats the contribution amounts as a cost of doing business and, like all costs and expenses, this is reflected in the prices charged to all guests.

Redeeming Points/Reimbursements from the "Fund"

19. For point redemption purposes, participating hotels are grouped into seven categories by location and type. An average of 7,500 points must be redeemed by the member to receive a free room at a category one hotel. An average of 35,000 points must be redeemed for a room at a category seven hotel. An upgrade would require the redemption of additional points.

20. The number of Reward Points needed to be redeemed for a Rewards Redemption Stay, i.e., a hotel stay obtained by redeeming points, may vary by the length of the stay, location of the room and amenities, the category of hotel and time of year.

21. When redeeming points a Marriott Rewards member must indicate that the reservation is for a Marriott Rewards redemption. A Reward Certificate will be provided to the member

when he or she checks into the participating hotel. The Reward Certificate can be redeemed for a single or double standard room and includes the cost of the hotel room, room tax and service charge.

22. To use their Marriott Rewards for a stay at a participating hotel, members may make reservations online, by calling the particular hotel, or by calling one of Marriott International, Inc.'s phone line reservation telephone numbers.

23. From 2001 through 2006, an average of about 87% of all points were redeemed for hotel stays. The remaining points were redeemed for rental cars (about 1%), merchandise through the Marriott Rewards catalogue (about 6%), vacation packages (about 3%), airline tickets (about 4%) and other miscellaneous categories. Points cannot be redeemed for cash.

24. A participating hotel receives no payment from a member who redeems points for a stay at the hotel.

25. Marriott Rewards is obligated to reimburse the hotels for the occupancy obtained through points redeemed when members redeem points for a hotel room. The reimbursement-rate calculation is performed annually, and the end result of the calculation determines the hotel's reimbursement rate for the year. The reimbursement rate for a participating hotel by Marriott Rewards varies depending on the brand and the volume of redemptions at the hotel, and takes into account two factors. To the extent redeemed room nights are less than 2.5% of all paid room nights for a particular period, the reimbursement rate is \$15.00. Redeemed nights above 2.5% amount are reimbursed based on the hotel's "RevPar," Marriott's term for the standard revenue per room at the hotel. The end result of this calculation is a flat rate, classified as a percentage of RevPar. Based on this calculation, a hotel will get 70% of RevPar, or 80% of RevPar, etc.

Generally, the more rooms are redeemed by a hotel, the higher percentage of RevPar it will receive. But no hotel would ever get 100% of RevPar.

26. The Participation Agreement requires that participating hotels invoice Marriott Rewards for “room nights or other services given in redemption of Marriott Rewards Certificates.”

27. Since the reimbursement amount is determined on an annual basis, the amount payable to any particular hotel is not specific to the operations of the hotel on a specific day. Whether the hotel is having a good day or a bad day, its reimbursement amount during any particular year is the same.

28. The reimbursement amount paid to any particular hotel is not specific to the nature of any particular room. A hotel will get the same reimbursement whether the member gets a suite or a single room when points are redeemed. The hotel will get the same reimbursement whether the guest gets one or two beds, and it will get the same reimbursement regardless of the actual costs associated with the provision of the room to a member, i.e., such as cleaning costs, utility costs, etc.

29. Petitioners do not actually receive a payment from Marriott Rewards each time it provides a room to a member. Instead, Marriott Rewards determines the applicable payments payable to petitioners on a periodic basis based on the reporting periods, i.e., 13 times a year.

30. Not all funds paid by participating hotels to Marriott Rewards are used to pay the hotels for the hotel stays by Marriott Rewards Program Members. Approximately 83-84% of its expenditures are payments to hotels for hotel stays by Marriott Rewards Program members and the balance of expenditures are for administrative and advertising expenses related to the

Marriott Rewards Program. Marriott Rewards only pays for petitioners' advertising expenditures related to the Point Program.

Contributions/Reimbursements: The Netting Process

31. For each period in the reporting periods, contributions due from each petitioner and payments payable by the Fund are netted against each other. Thus, if the amount of the contribution due to the Fund was equal to or less than the payment payable from the Fund in a particular reporting period, a petitioner would not have been responsible for making any contributions to the Fund during such period. Similarly, if the amount of the contribution due the Fund was equal to or greater than the amount of the payment payable to a petitioner in any particular reporting period, the Fund would not have been responsible for making any payments during such period.

32. The system of reimbursements and contributions did not affect the payment of sales taxes in New York. Specifically, petitioners paid full New York State and local sales taxes on all repayments to them from the Fund without deduction for any contributions determined to be due to the Fund. Thus, in any particular reporting period, although petitioners may not have received any payments from the Fund because of excess contributions due the Fund, petitioners would nevertheless have paid full New York State and local sales taxes on the repayments determined to be payable under the terms of the Marriott Rewards Participation Agreement. For example, one of the petitioners (Brooklyn Renaissance Hotel LLC) owns and operates the Brooklyn Marriott in New York City. In 2005, this petitioner did not receive any net payments from the Fund since its required contributions to the Fund (\$783,644.00) exceeded the allowable reimbursements from the Fund (\$536,680.00). Thus, in 2005, this petitioner ultimately paid \$246,964.00 into the Fund (the difference between the calculated reimbursements and the

calculated contributions). Nevertheless, New York sales tax was paid by this petitioner on the full reimbursement calculated to be due from the Fund without deduction for petitioner's required contributions (i.e., full sales tax was paid on \$536,680.00).

33. During the periods in question, the amounts each respective petitioner was required to contribute to the Fund pursuant to the Contribution Calculation was as follows:

Hotel Name	Refund Period	Total Contribution
NY Midtown Manhattan Courtyard	03/2003 - 02/2006	\$924,438.22
NY LaGuardia Airport Marriott	03/2003 - 02/2006	1,824,815.06
Long Island Marriott	03/2003 - 02/2006	2,152,801.81
NY Marriott Marquis	10/2000 - 04/2006	21,384,083.08
Renaissance NY Times Square	10/2000 - 04/2006	3,554,021.62
NY Marriott Financial Center	03/2003 - 02/2006	2,749,603.61
NY Marriott East Side	10/2000 - 04/2006	8,114,242.97
NY Marriott at Brooklyn Bridge	03/2003 - 02/2006	2,063,339.85
Righa Royal Marriott	05/2001 - 06/2005	4,446,635.46

34. Each of petitioners' refund claims is based on taxes paid on reimbursements payable from the Fund without deduction or credit for these required contributions.

35. A hotel like the Brooklyn Marriott that pays more into the program than it receives still benefits more from Marriott Rewards than would a hotel in a more popular destination.

The Refund Claims

36. The participating hotels each filed refund claims for sales tax paid on the money received from Marriott Rewards for the occupancy of room nights (term used in Participation Agreement to characterize an overnight stay) acquired by Marriott Rewards members redeeming

points. It is undisputed that sales tax was paid by Marriott Rewards to the participating hotels based on the reimbursement amount Marriott Rewards paid to the hotels.

37. On December 19, 2003 and June 18, 2006, each petitioner filed refund claims requesting a refund of sales taxes paid on the reimbursements payable from Marriott Rewards during the applicable sales tax periods. It is undisputed that sales tax was paid by Marriott Rewards to the participating hotels based on the reimbursement amount Marriott Rewards paid to the hotels.

38. The parties have agreed that in the event it is determined that the transactions between petitioners and Marriott Rewards are not subject to sales tax, petitioners will be entitled to a refund of \$6,544,711.88, plus applicable interest.

CONCLUSIONS OF LAW

A. Tax Law § 1105(e) imposes a sales tax on the rent for occupancy of a hotel room. The term “rent” is defined under Tax Law § 1101(c)(6) as “consideration received for occupancy” in a hotel. Tax Law § 1101(c), in turn, defines occupancy as “[t]he use or possession” of a hotel room.

B. The essence of the dispute may be simply stated. The crux of petitioners’ argument is that the reimbursements received by them from Marriott Rewards are not consideration for occupancy in a hotel. The Division, on the other hand, maintains that petitioners receive consideration for the occupancy from Marriott Rewards. As set forth, the dispute is a matter of statutory construction. A proper resolution of the issue is dependent upon an examination of the nature of the transactions which are occurring between Marriott Rewards, the hotels and the Rewards members.

C. Here, the hotels promised to participate in the Marriott Rewards marketing program by making contributions to a fund, by purchasing and redeeming points and by redeeming points when presented by a member. In exchange for the hotel's promise to participate and fund the program, Marriott Rewards reimbursed the hotels for their cost of participation which included the return of previously contributed funds. A calculation was prepared 13 times a year which took into account petitioners' required contributions and potential credits or reimbursements against its contributions. In the event that petitioners were entitled to a reimbursement from the Fund, the amount of reimbursement was always net of the required contributions.

As pointed out by petitioners, Marriott Rewards did not pay petitioners each time a room was provided to a member. Similarly, petitioners did not receive an identifiable payment for every room provided under the Marriott Rewards program. The amount of the reimbursement did not equal the hotel's actual charges for providing a specific hotel room or the hotel's cost of providing a particular room to a member. The hotel received the same amount whether the member was given a single room or a suite or whether the hotel was busy or slow. The reimbursement from Marriott Rewards to petitioners did not entitle Marriott Rewards to the right to occupy a room or the right to distribute a room. It follows that the reimbursement was not consideration for hotel occupancy. Rather the method of payment supports the finding, as asserted by petitioners, that the Rewards Program was designed to reimburse the hotel for participation in the Marriott Rewards Program which, in turn, was a marketing tool intended to increase stays at Marriott Hotels. Therefore, the consideration received by the hotels from Marriotts Rewards is not subject to sales tax. The consideration for the occupancy of the hotel room was, in fact, provided by the customer who usually earned the points through previous lodgings at Marriott hotels.

D. The Division's position is based on the proposition that the participating hotels were paid according to a formula which is based upon the occupancy of Marriott Rewards members redeeming points. The Division notes that if there is no occupancy, there was no payment. This argument is without merit because it fails to recognize that it would be erroneous to tax a transaction as consideration for a stay in a hotel room when the primary purpose of the payment was reimbursement for participation in a program which was a marketing program to promote stays in a hotel (*see Matter of Empire St. Bldg. v. Dept. of Taxation and Fin.*, 81 NY2d 1002 [1993]; *Matter of Debevoise & Plimpton v. Dept. of Taxation and Fin.* 80 NY2d 657 [1993]). The fact that the hotels are reimbursed according to a formula that factors in occupancy does not alter this conclusion (*id*).

E. There are a few points raised in the parties' briefs that warrant attention. First, the Division argues that if petitioners' prevail, then sales tax would not be due when the hotel occupancy is obtained through a travel service such as Hotels.com.⁴ This argument lacks merit because it fails to make a distinction between a travel service such as Hotels.com which exists, at least in part, in order to provide a taxable service, i.e., provide a hotel room, and the program at issue in this matter which is a nontaxable marketing program. As set forth above, the controlling consideration for the imposition of sales tax is the primary purpose of the program.

F. The Division submits that its position on the redemption of Marriott Rewards points is consistent with the Division's "trading stamp rule" which states that the redemption of trading stamps for tangible personal property is subject to sales tax. The application of this rule to the issue presented here is dubious. As pointed out by petitioners, a central difference is that under

⁴ The Division has issued an Advisory Opinion that addresses the taxability of hotel accommodations provided through an internet travel company that secures hotel accommodations with unrelated hotel operators. TSB-A-04(6)S.

the trading stamp rule, the tax is collected from the individual who redeemed the stamps. In contrast, here the Division is not seeking to collect the tax sought on the discounted room from the hotel patron. Rather, it is trying to collect the tax from Marriott Rewards. It follows that the trading stamp rule is not relevant to this matter.

G. In support of its position, the petitioners note that the City of New York Department of Finance issued a Finance Memorandum (number 06-2, November 30, 2006) addressing the issue of whether the New York City Hotel Room Occupancy Tax applies to “typical rewards points programs.”⁵ The memorandum concluded that when a hotel guest redeemed points for a room, the hotel was not required to collect tax on the occupancy. Hence, the position advocated by petitioners has the salutary effect of being consistent with a position already adopted by the City of New York Department of Finance.

The Division replies that the Finance Memorandum is inapposite because the memorandum stated that it was addressing the provision of complementary rooms. According to the Division, the rooms provided to the points program members are not complementary because the points program members earn the right to the rooms by acquiring points from Marriott Rewards which pays the hotels for the occupancy. This argument is fallacious. A reading of the Finance Memorandum shows that it specifically included the situation where a guest earned points by staying at a participating hotel. The Division also states that the Finance Memorandum addresses a distinguishable situation because it concerned the receipt of complementary rooms. This argument also fails to recognize that in each situation the consideration for the rooms was

⁵ The City of New York Admin Code § 11-2502(a)(1) imposed a tax on the daily rent for the occupancy of a hotel room in New York City.

provided, in most instances, by the guests previously staying at a hotel which provided the requisite points.

H. In view of the conclusions reached herein, the remaining points raised by the parties are academic and will not be addressed.

I. The petitions of Marriott International, Inc., et al., are granted, and the Division is ordered to refund the amount of \$6,544,711.88, plus interest, as indicated in Finding of Fact 38.

DATED: Troy, New York
November 26, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

APPENDIX

Petitioner	DTA #
Marriot International, Inc.	821078
New York East Side Hotel Services, Inc.	821079
Times Square HMC Hotel	821080
Renaissance Hotel Operating Co.	821219
Courtyard Management Corp.	821374
East Side Hotel Services, Inc.	821375
Marriot International, Inc.	821376
Brooklyn Renaissance Hotel LLC	821380
CCMH Financial Center LLC	821381
CCMH Times Square LLC	821382
Coliseum Hotel Associates, Inc.	821383
LaSalle Hotel Lessee, Inc.	821384
Renaissance Hotel Operating Co.	821385
Marriot Rewards LLC	821753