STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK M. GUGLIOTTA D/B/A PARKVIEW LODGE AND UPLAND GAME PRESERVE	:	DETERMINATION DTA NO. 823157
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2001 through February 28, 2002, December 1, 2004 through February 28, 2005, and December 1, 2005 through February 28, 2006.	:	

Petitioner, Frank M. Gugliotta d/b/a Parkview Lodge and Upland Game Preserve, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 2001 through February 28, 2002, December 1, 2004 through February 28, 2005, and December 1, 2005 through February 28, 2006.

On March 1, 2010 and March 5, 2010, respectively, petitioner, appearing by Martin L. Fried, Esq., and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., and Anita Luckina, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by July 15, 2010, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether charges by a game preserve operator to hunters for game birds to be hunted on the preserve is properly construed as a sale of tangible personal property pursuant to Tax Law § 1105(a) or an admission charge to hunt on the preserve, a participatory sporting activity specifically excepted from the sales tax on admission charges pursuant to Tax Law § 1105(f)(1).

II. Whether, if deemed a sale of tangible personal property, such sales are exempt from tax under Tax Law § 1115(a)(1) as food sold for human consumption.

III. Whether, if the subject charges are properly taxable, petitioner has established any facts or circumstances warranting the abatement of penalties imposed herein pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

1. Petitioner, Frank M. Gugliotta, owns and operates a lodge and game preserve known as Parkview Lodge and Upland Game Preserve. The game preserve, licensed by the New York State Department of Environmental Conservation (DEC), offers, among other activities and services, game bird hunting of pheasant, chukar and quail within its confines.

2. To participate in a game bird hunt, a hunter must direct the preserve to release birds about an hour before the hunt begins. The hunter then has a period of time (game bird hunts are scheduled for mornings and afternoons) to shoot the released game birds, as well as any other birds remaining on the preserve from a previous hunt.

3. Pricing for a game bird hunt is based solely on the number of birds released by the preserve. The hunter chooses the number of birds to be released, although the preserve requires the release of a minimum number per hunter. Hunters are charged a price per released bird. The minimum number and price vary depending upon the type of bird selected. Specifically, a

pheasant hunt requires the release of at least 4 birds per hunter at $19.00 per bird, a chukar hunt requires a minimum of 5 birds per hunter at $12.00 per bird, and a quail hunt requires a minimum of 10 birds per hunter at $7.00 per bird.

4. Once released, there is no guarantee that the hunter will kill any of the birds. The birds may escape the preserve (there is no enclosure to contain the birds) or the hunter may lack the skill necessary to shoot them. Also, as noted, hunters are free to shoot any birds left over from a previous hunt. A hunter may therefore take more or fewer birds than are released without an addition to or diminution of the charge.

5. All of the game birds released for hunting are bred and raised on the preserve.

6. The preserve is prohibited from selling live birds to the public and may sell live birds only to a DEC-licensed breeder or a DEC-licensed preserve operator.

7. The preserve offers season packages for game bird hunters at a slightly reduced cost per bird.

8. Following the hunt, most hunters clean their own harvested birds in a designated area provided by the preserve. The preserve provides a bird-cleaning service for an extra charge.

9. The preserve also has a taxidermy service available to hunters at an additional charge.

10. Hunters often eat their harvested and cleaned game birds.

11. No hunting license is required to hunt game birds on the preserve, and such hunting is not limited to the regular New York State hunting seasons. A license is required to hunt game birds off the preserve. Birds that leave the preserve may be hunted with a license and subject to state regulations with respect to season and location.

12. The preserve also offers wild turkey and deer hunts. In contrast to the game bird hunts, petitioner does not release deer or turkeys onto the preserve and thus does not charge a per

deer or per turkey amount for these hunts. Rather, petitioner lures native turkeys and deer onto the preserve. Turkey and deer hunts require appropriate New York state hunting licenses and are restricted to the regular New York State hunting seasons.

13. Following an audit of petitioner's business operations, the Division of Taxation (Division) concluded that per bird charges to game bird hunters as described herein were taxable sales of tangible personal property. Using petitioner's records, the Division totaled such payments in respect of the periods at issue and calculated tax due thereon. On February 25, 2008, the Division issued to petitioner a Notice of Determination for the periods December 1, 2001 through February 28, 2002, December 1, 2004 through February 28, 2005, and December 1, 2005 through February 28, 2006, which asserted $9,179.69 in additional tax due, plus penalty and interest. Petitioner does not contest the Division's audit methodology or its calculation of additional tax due. Rather, petitioner contends that his receipts in respect of the game birds were nontaxable.

14. In not charging sales tax on the per bird charges for game bird hunting, petitioner relied on letters from the Division to unrelated third parties in response to requests for advice.

15. One such letter, dated August 17, 1965, from Fred W. Tierney, Director, Sales Tax Bureau, provides in relevant part:

> This is in reply to your letter of August 9, 1965.
>
> Where the private shooting preserves provide game birds to restaurants and private individuals, as food, the sales are exempt from the sales tax.
>
> If a preserve operates on a membership-dues paying basis, it is considered an athletic club and the dues are taxable if in excess of $10.00 per year . . . .
>
> Where the preserve charges an admission fee in addition to a charge for birds taken, the admission fee is subject to tax, but the charge per bird is not.

16. A second letter, dated August 26, 1965, also from Mr. Tierney, "supplements" the August 17, 1965 letter by advising that "it is not necessary to secure Resale Certificates on your sales of game birds . . . ."

17. A third letter, dated December 22, 1971, from Kermit J. Smith, Chief, Audit Section, states, in relevant part, that "[t]here has been no change in the Bureau's position stated in our letter of August 17, 1965."

18. A fourth letter, bearing a 1991 date (the month and day are obscured on the copy in evidence), from Anthony M. Salerno of "Taxpayer Correspondence," provides, in relevant part:

> This is in reply to your recent letter concerning the sales tax status of the following:
>
> (1) The admission charge to a private bird shooting preserve - since the charge is for the use of sporting facilities where the patron is a participant - is not taxable.
>
> (2) The sale of cleaned, dead birds to restaurants or individuals is non-taxable as the sale of food that is for human consumption.
>
> (3) The charge for a bird that is made in addition to the charge for the admission to the shooting preserve will not be subject to the tax.

CONCLUSIONS OF LAW

A. The first question presented is whether petitioner's per bird charges as described herein are properly characterized as a sale of game birds or a fee for the right to hunt game birds on the preserve. Retail sales of tangible personal property, such as birds, are subject to sales tax unless specifically exempt (Tax Law § 1105[a]). Conversely, charges to a patron for admission to or for the use of sporting facilities or activities in which the patron is to be a participant are excluded from sales tax (Tax Law § 1105[f][1]). Accordingly, if characterized as a sale of tangible

personal property, the charges associated with game bird hunting would be presumptively taxable; if deemed a fee to hunt, the charges would not be taxable.

B. The record shows that, in exchange for their payment of the per bird charge, game bird hunters received the right to direct the release of game birds and the right to hunt game birds at the preserve. Petitioner thus sold tangible personal property[1] for use in conjunction with a participatory sporting activity. Pursuant to the Division's regulations, such sales are taxable (***see*** 20 NYCRR 527.10[d][4][example 6]). The cited example notes that the rental of bowling shoes is taxable notwithstanding that charges for the use of bowling lanes is excluded from tax. The present situation, where hunters purchase birds to be released and hunted on the preserve, is closely analogous. Although, as noted, in exchange for their per bird charges, hunters received both game birds and the right to hunt such birds on the preserve, petitioner chose to charge hunters only for their purchase of birds. Under such circumstances, the per bird charges are, in their entirety, properly considered sales of tangible personal property. Petitioner's contention to the contrary that the per birds charges were solely a nontaxable hunting fee is rejected, considering that hunters were required to purchase game birds in order to hunt birds on the preserve and that petitioner charged hunters only for the birds. Moreover, even if the per bird charges were deemed to include an amount allocable to the nontaxable activity of hunting, the total charge would remain taxable, as it is well established that if a single invoice charge includes taxable and nontaxable components, the entire charge is subject to tax (***Matter of La Cascade v.***

[1] The right to direct the release of the game birds as prey to be hunted on the preserve is a "sale" for sales tax purposes (***see*** Tax Law § 1101[b][5]; 20 NYCRR 526.7). It is observed that, while petitioner is prohibited from selling live game birds as such to the public (***see*** Finding of Fact 6), he is not prohibited from selling such birds to hunters as prey to be hunted on the preserve.

State Tax Commn., 91 AD2d 784, 458 NYS2d 80 [1982]; ***Matter of Artex Systems, Inc., v. Urbach***, 252 AD2d 750, 676 NYS2d 284 [1998]; Tax Law § 1132[c]; 20 NYCRR 527.1[b]).

C. Alternatively, petitioner contends that such sales were exempt from tax pursuant to Tax Law § 1115(a)(1) as food sold for human consumption. The term "food" as used in this provision means "edible commodities whether prepared, processed, cooked, raw, canned or in any other form, which are generally regarded as food," and includes "meat and meat products" and "poultry" (20 NYCRR 528.2[a][2]). The phrase "sold for human consumption" means that "the items sold are, in their normal use, regarded as being for human consumption" (20 NYCRR 528.2[a][3]).

D. Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed against the taxpayer (***see Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582 [1994], ***lv denied*** 85 NY2d 806, 627 NYS2d 323 [1995]; ***Matter of Lever v. New York State Tax Commn.***, 144 AD2d 751, 535 NYS2d 158 [1988]). "Petitioner has the burden of showing clear entitlement under a provision of the law plainly giving the exemption (citation omitted)" (***Matter of Old Nut Co. v. New York State Tax Commn.***, 126 AD2d 869, 871, 511 NYS2d 161, 163 [1987], ***lv denied*** 69 NY2d 609, 516 NYS2d 1025 [1987]). Indeed, to prevail petitioner must show that his interpretation of the relevant statute and regulation is the only reasonable construction (***see Matter of F.D.I.C. v. Commr. of Taxation & Finance***, 83 NY2d 44, 607 NYS2d 620 [1993]; ***Matter of CBS Corp. v. Tax Appeals Tribunal***, 56 AD3d 908, 867 NYS2d 270 [2008], ***lv denied*** 12 NY3d 703, 876 NYS2d 704 [2009]). Unless determined to be irrational or erroneous, the Division's regulations have "the force and effect of law" (***see Matter of General Electric Capital Corporation v. Division of Tax Appeals***, 2 NY3d 249, 254, 778 NYS2d 412, 415 [2004]).

E. Petitioner has not established that the game birds were sold for human consumption as required to qualify for the exemption. The record shows that the birds were sold as prey to be released on the preserve under conditions where the success of the hunt was not guaranteed (***see*** Findings of Fact 4). This "normal use" of the birds may not reasonably be "regarded as being for human consumption" (***see*** 20 NYCRR 528.2[a][3]), notwithstanding that some of the birds ultimately are consumed.

F. Turning to the issue of penalties, Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax "shall" be subject to a penalty. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***Matter of MCI Telecommunications, Corp.***, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993).

G. Petitioner's reliance on the prior written advice from the Division to various third parties operating similar businesses (***see*** Findings of Fact 14-18) as the reason for his failure to charge sales tax on the per bird charges was a reasonable effort to ascertain the proper tax liability (***see Matter of LT & B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185, 535 NYS2d 121 [1988]; 20 NYCRR 2392.1[g][2][iv]). Under the circumstances of this case,

such reliance constitutes reasonable cause and clearly indicates an absence of willful neglect, thereby justifying abatement of penalties (***see*** 20 NYCRR 2392.1[d][5]). Penalties imposed herein are thus cancelled.

H. The petition of Frank M. Gugliotta d/b/a Parkview Lodge and Upland Game Preserve is granted to the extent indicated in Conclusion of Law G and is in all other respects denied. The Notice of Determination, dated February 25, 2008, is modified pursuant to Conclusion of Law G and, as modified, is sustained.

DATED: Troy, New York
December 30, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE