STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OLD FORGE KAMPGROUNDS, LLC	:	DETERMINATION DTA NO. 823254
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, 2005 through November 30, 2008.	:	

Petitioner, Old Forge Kampgrounds, LLC, 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 period December 1, 2005 through November 30, 2008.

On September 21, 2010 and September 22, 2010, respectively, petitioner, appearing by Stephen L. Solomon, Esq., and the Division of Taxation, appearing by Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by January 26, 2011, 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.

ISSUE

Whether sales tax is properly payable on the rental of cottages located on petitioner's campground where the rental period is less than seven days.

FINDINGS OF FACT[1]

1. Petitioner, Old Forge Kampgrounds, LLC, owns and operates a year-round campground located in the Adirondack Mountains in Old Forge, New York. The grounds contain 335 sites set on 130 acres.

2. There are 34 sites for tents, 129 sites for recreational vehicles (RVs), 132 log cabins, and 40 cottages.

3. Every tent and RV site has a picnic table, fire pit, and is conveniently located near one of seven heated restrooms and shower facilities.

4. Each of the 132 one-room log cabins has a double bed and a set of single bunks. Each also has an overhead light, two electrical outlets, a heater, a small bench and a utility table. There are no televisions or telephones in any of the cabins. Outside of each cabin there is a porch swing, a fire pit and a picnic table. A short walk away are heated restrooms and shower facilities that also have camping kitchens outside for the campers' cooking convenience. Campers using the cabins must supply their own linens or sleeping bags, as well as soap and towels.

5. Each of the 40 cottages has two rooms. The front room contains a double bed with a single bunk above it and also has a kitchenette, which includes a microwave, propane stove top, small refrigerator, sink, a dining table and six chairs. The second room contains a double bed with a single bunk above it and has an attached bathroom with shower and sink. The cottages have lighting, electricity and heat. There are no televisions or telephones in any of the cottages.

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[1] In accordance with section 3000.11 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.11), the parties entered into a stipulation of facts relevant to this matter. Except as to facts involving the procedural history of this matter and a detailed schedule of the revised tax liability at issue, the stipulated facts are set forth in their entirety.

Campers using the cottages must supply their own cooking items, linens or sleeping bags, as well as soap and towels. Outside, each cottage has a picnic table, fire pit and grill.

6. Petitioner does not provide campers using any of its 335 sites with any common hotel services, such as, but not limited to, food, maid service, towels or linen services, although campers can rent a linen package at petitioner's grocery store as described below.

7. Petitioner operates a grocery store on the grounds where campers can purchase food, beverages, clothing, gas, wood, charcoal, soap, paper towels, toilet paper, and miscellaneous items, such as cards or souvenirs. As noted, campers may also rent a linen package consisting of a fitted sheet, a flat sheet, two pillows with pillow cases, a blanket, two bath towels, two hand towels and two wash cloths. The charge for the package is $10.00, plus sales tax, for the first package and $5.00, plus sales tax, for any additional packages.

8. The Division of Taxation (Division) conducted an audit of petitioner's sales and use tax returns covering the period December 1, 2005 through November 30, 2008.

9. The Division reviewed petitioner's returns and found that, except as discussed below, there were no significant errors in the accountability of its purchases or sales.

10. The Division determined that no sales tax was due on the charges for the campers' rental of tent sites, RV sites, or log cabins, regardless of the duration of such use.

11. The Division determined that no sales tax was due on the charges for the campers' rental of the cottages for seven or more days, but that sales tax was due on the charges for the campers' rental of the cottages for less than seven days.

12. On June 26, 2009, based generally on the foregoing audit determinations, the Division issued to petitioner a Notice of Determination (assessment number L032249785-2) asserting

additional tax due of $387,713.37, plus interest of $71,498.79, for the period December 1, 2005 through November 30, 2008. No penalties were assessed.

13. Petitioner subsequently agreed to pay sales tax on a minor item related to the rental of linens and paid the amount of tax due thereon of $98.93, plus interest.

14. After further review and discussion among the parties, the Division modified and reduced its determination of tax due in this matter to $139,290.87, plus interest. This modified assessment is based solely on the charges for the campers' rental of the cottages for periods of less than seven days.

CONCLUSIONS OF LAW

A. New York imposes sales tax on the rent for occupancy of a room or rooms in a hotel within the state (Tax Law § 1105[e]). Tax Law § 1101(c)(1) defines hotel for purposes of the tax imposed under Tax Law § 1105(e) as:

> A building or portion of it which is regularly used and kept open as such for the lodging of guests. The term 'hotel' includes an apartment hotel, a motel, boarding house or club, whether or not meals are served.

B. The Division's regulations echo this statutory definition, but add "bungalow or cottage colony" to the list of examples included within the definition (***see*** 20 NYCRR 527.9[b][1]).[2]

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[2] As currently amended, effective March 11, 2009, the regulatory definition of hotel adds the following sentence:

> A building, or portion of a building, falls within this definition if, among other factors:
>
> (i) sleeping accommodations are provided for the lodging of paying occupants on a regular basis;
>
> (ii) typical occupants are transients or travelers;
>
> (iii) maid, linen, or other customary hotel services are provided for occupants; and
>
> (iv) the relationship between the operator of the establishment and the occupant is that of an innkeeper and guest, not that of a landlord and tenant (e.g., the occupant does not have an exclusive right or privilege with respect to any particular room or rooms, but instead merely has an agreement for the use or possession of the room or rooms)

C. Section 527.9(e) of the regulations (20 NYCRR 527.9[e]) deems the following occupancies as not subject to the tax on hotel rooms: a room or rooms without sleeping facilities and used solely as a place of assembly, healthcare and similar facilities, summer camps, college dormitories, and bungalows. With respect to the rental of bungalows, the regulation in effect during the period at issue specifically provided as follows:

> A lessor of bungalows who rents bungalows which are furnished living units limited to single family occupancy is not the operator of a hotel. Therefore the rents for the occupancy of such bungalows are not taxable, provided:
>
> (i) No maid, food, or other common hotel services, such as entertainment or planned activities, are provided by the lessor; and
>
> (ii) The rental is for at least one week.
>
> The furnishing of linen by the lessor with the rental of a bungalow without the services of changing the linen does not alter the nontaxable status of the rental charges. (20 NYCRR former 527.9[e][5].)[3]

D. There is no dispute that the cottages at issue, with kitchenettes, bathrooms and sleeping rooms, were "furnished living units" and therefore "bungalows" within the meaning of the relevant regulations (20 NYCRR former 527.9[e][5]; ***see also*** Pub. 848 [A Guide to Sales Tax for Hotel and Motel Operators], 3/08). Indeed, the dictionary definition of bungalow as "a small

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(20 NYCRR 527.9[b][1][i-iv]).

[3] Effective March 11, 2009, 20 NYCRR 527.9(e)(5) was renumbered and the language revised (although not substantively) as follows:

> (i) A bungalow or similar furnished living unit limited to single family occupancy is not a hotel provided:
>
> (a) no maid, food, or other common hotel services, such as entertainment or planned activities, are provided by the lessor; and
>
> (b) the rental is for at least one week.
>
> (ii) The furnishing of linen by the lessor without the service of changing the linen does not alter the nontaxable status of any rental charges.

house or summer cottage" (Random House Webster's College Dictionary 175 [1997]) aptly describes petitioner's cottages.

E. Pursuant to the language of 20 NYCRR former 527.9(e)(5), and assuming the validity of that regulation, the cottage rentals at issue were properly taxable. That is, although maid, food or other common hotel services, such as television or phone service, were not provided, the subject rentals were for periods of less than one week. The rentals at issue thus failed to meet the durational requirement for nontaxable occupancy as set forth in the regulation.[4]

F. Petitioner, however, challenges the validity of the one-week rental requirement for nontaxable bungalow occupancy in the regulations (20 NYCRR former 527.9[e][5][ii]). Petitioner asserts that this requirement is inconsistent with the statutory definition of hotel in Tax Law §1101(c)(1).

G. Pursuant to Tax Law § 2006(7), the Division of Tax Appeals has authority to rule on the validity of regulations promulgated by the Division of Taxation in accordance with the following principles:

> In general, regulations are upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assocs. v. Tully***, 79 AD2d 761, 434 NYS2d 788 [3d Dept 1980], ***affd*** 54 NY2d 711, 442 NYS2d 978 [1981]) or erroneous (***Matter of Koner v. Procaccino***, 39 NY2d 258, 383 NYS2d 295 [1976]). Of course, the interpretation of the agency charged with administering a statute is entitled to deference, but not where, as here, the issue is one of pure statutory construction (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, 80 NY2d 657, 593 NYS2d 974 [1993]; ***Kurcsics v. Merchants Mut. Ins. Co.***, 49 NY2d 451, 426 NYS2d 454 [1980]). As discussed above, the Division is not empowered to "promulgate a regulation that adds a requirement that does not exist under the statute. '. . . Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute'" (***Emunim v. Town of***

[4] The Division followed 20 NYCRR former 527.9(e) in its audit determination that rentals of the cottages for periods of one week or more were nontaxable (***see*** Finding of Fact 11).

> ***Fallsburg***, 78 NY2d 194, 573 NYS2d 43 [1991]). (***Matter of Langlan***, Tax Appeals Tribunal, September 4, 1997.)

H. Although phrased in terms of nontaxable occupancy, the regulation at issue effectively creates a special definition of hotel as applied to bungalows.[5] The first condition for inclusion within the definition, the presence of common hotel services (***see*** 20 NYCRR former 527.9[e][5][i]), is consistent with the traditional common law understanding of a hotel; that is, that the "essential business" or "true function" of a hotel is to provide services to its guests (***see Matter of Helmsley Enterprises, Inc. v Tax Appeals Tribunal***, 187 AD2d 64, 592 NYS2d 851 [3d Dept 1993], ***lv denied*** 81 NY2d 710, 600 NYS2d 197 [1993]). This requirement is thus implicit in the statutory definition of hotel in Tax Law § 1101(c)(1). Accordingly, the current regulatory definition of hotel logically and properly lists the provision of such services as a factor in determining whether a particular building is a hotel (***see*** 20 NYCRR 527.9[b][1][iii]). Here, as noted, petitioner's bungalows did not meet this first condition as no such services were provided.

In contrast, the less-than-one-week-stay component of the bungalow-hotel definition in 20 NYCRR former 527.9(e)(5)(ii) finds no support in the common law. As petitioner correctly notes, the common law notions of hotel accommodations focus on the services provided and the innkeeper-guest relationship and not on the duration of the occupant's stay:

> An inn or a hotel more elaborately defined, may be considered as an establishment where guests, transient or otherwise, are lodged for a consideration and where they may receive for a consideration, meals, maid or room-service,

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[5] Although the general definition of hotel in the regulations includes bungalows without any service or length of stay requirements (***see*** 20 NYCRR 527.9[b]), the provisions of 20 NYCRR 527.9 (former [e][5]) are necessarily controlling in determining whether a bungalow is a hotel for sales tax purposes. Otherwise former section 527.9(e)(5) would be rendered meaningless, a construction that is to be avoided (***see Matter of Morton Bldgs. v. Chu***, 126 AD2d 828, 510, NYS2d 320, 321 [3d Dept 1987], ***affd*** 70 NY2d 725, 519 NYS2d 643 [1987]).

> telephone or desk service and all other necessities, conveniences and facilities to completely take care of all their ordinary and proper wants, day and night, *for a stay of one day, several days or a long period*. (***Von der Heide v. Zoning Board of Appeals***, 204 Misc. 746, 749, 123 NYS2d 726, 730 [Sup Ct, Westchester County, 1953], ***affd*** 282 App Div 1076, 126 NYS2d 852 [2d Dept 1953]; emphasis added.)

Similarly, except with respect to the specific provision at issue, both the statute and the regulations define hotel not by the length of the occupant's stay, but rather by the nature of the accommodations. Accordingly, a "building or portion of it which is regularly used and kept open for the lodging of guests" is, generally, a hotel (***see*** Tax Law § 1101[c][1]), while places of assembly, nursing homes, summer camps and college dormitories, as well as campsites and trailer sites are not (***see*** 20 NYCRR 527.9[e]). Each of these exceptions to the general definition is premised on the notion that the particular building or location is itself different from a hotel and therefore should not be considered as such for sales tax purposes. The sole exception to this approach is the bungalow provision in 20 NYCRR former 527.9(e)(5)(ii), which effectively ties the definition of hotel to a one-week stay. The Division offers no argument, however, as to why such a time factor is uniquely relevant or rational in determining whether a bungalow - and no other type of accommodation - should be considered a hotel for sales tax purposes. Likewise, the Division offers no rationale for its choice of one week as the line of demarcation between a taxable hotel room and a nontaxable bungalow. This choice means that, for a six-day stay, petitioner's bungalows are hotel rooms and are taxable, while, for a seven-day stay, the same bungalows are not hotel rooms and are not taxable. This juxtaposition of similar circumstances and contrary results shows the illogic and irrationality of the regulation.

The one-week rental requirement for a nontaxable bungalow occupancy in 20 NYCRR former 527.9(e)(5)(ii) is thus a requirement that does not exist under the statutory definition of

hotel in Tax Law § 1101(c)(1). As such, this regulation goes beyond the Division's authority to make reasonable rules and regulations consistent with the law (***see*** Tax Law § 171[1]) and is therefore invalid (***see Matter of Langlan***).[6]

I. Having determined that the one-week bungalow rental requirement for nontaxable occupancy is invalid, and considering that the other regulatory requirement has been met, i.e., that no common hotel services were provided, it follows that the cottage rentals at issue qualify as nontaxable occupancies pursuant to 20 NYCRR 527.9(e). The assessment remaining at issue must therefore be cancelled.

J. The petition of Old Forge Kampgrounds, LLC, is granted and the Notice of Determination dated June 26, 2009, as modified (***see*** Finding of Fact 14), is cancelled.

DATED: Troy, New York
June 2, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE

[6] This conclusion also would apply to the identical provision in the current regulations at 20 NYCRR 527.9(e)(5)(i)(b).