STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMPIRE HOLDINGS LLC	:	DETERMINATION DTA NO. 823762
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 March 1, 2003 through May 31, 2003 and March 1, 2004 through May 31, 2004.	:	

Petitioner, Empire Holdings 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 periods March 1, 2003 through May 31, 2003 and March 1, 2004 through May 31, 2004.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, One Penn Plaza, New York, New York, on January 10, 2012 at 10:30 A.M., and continued on January 11, 2012 at 9:15 A.M., with all briefs to be submitted by April 27, 2012, which date began the six-month period for the issuance of this determination. Petitioner appeared by Sidley Austin LLP (Richard A. Leavy, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether the transfer of tangible personal property as part of the sale of the Empire Hotel by petitioner constituted a bulk sale under Tax Law § 1141(c), subjecting petitioner to liability for the payment of sales and use taxes.

II. Whether the Division of Taxation's use of petitioner's book value as of December 31, 2003 to determine a fair market value of the tangible personal property sold was reasonable under the circumstances presented and, if not, what value was appropriate.

III. Whether the Notice of Determination contained a sufficient error to render it invalid or shift the burden of proof to the Division of Taxation.

IV. Whether petitioner, if liable for sales and use taxes from the sale of the Empire Hotel, is entitled to an offset for real estate transfer taxes paid on the transaction.

FINDINGS OF FACT

1. On July 9, 2003, petitioner, Empire Holdings LLC, entered into a handwritten contract of sale (the Original Contract) with Naspark Associates, LLC (Naspark) for the sale of the Empire Hotel, located at 44-50 West 63rd Street, New York, New York. At all relevant times, petitioner and Naspark were unrelated entities. It was the intent of Naspark to convert the building into residential condominiums once the Empire Hotel was purchased.

2. Pursuant to the terms of the Original Contract, Naspark was to pay $76,000,000.00 for the Empire Hotel, comprised of $11,000,000.00 in cash and an assumption of existing mortgages of $65,000,000.00. The property was to be delivered without hotel guests, and petitioner bore the costs of terminating all employees. The Original Contract provided for a refundable $2,000,000.00 deposit to be held outside of escrow.

3. According to the Original Contract, "[a]ll furniture and supplies," excluding liquor, were to be transferred to Naspark as part of the sale. No price was specifically allocated to the personalty in the Original Contract.

4. Petitioner was a registered vendor for New York State sales tax at all applicable times.

5. Pursuant to paragraph 15 of the Original Contract, petitioner was required to "deliver marketable title to the real property on which the hotel is located subject to the lien of a $65,000,000 existing mortgages and existing tenants and leases and non-monetary liens which DO NOT RESTRICT OR NEGATIVELY EFFECT the use of the premises as a hotel or the conversion thereof to residences or condos." The reference to marketable title related solely to the real property components of the Empire Hotel.

6. On August 12, 2003, petitioner and Naspark executed an agreement amending the Original Contract (the First Agreement). The First Agreement called for Naspark to pay an additional $2,000,000.00 into an escrow account, established a closing date of November 20, 2003 for the transaction, and provided Naspark the right to inspect the Empire Hotel. There was no amendment to the provision in the Original Contract concerning transfer of furniture and supplies to Naspark.

7. On September 26, 2003, petitioner and Naspark entered into a second agreement amending the Original Contract (the Second Agreement). Pursuant to the Second Agreement, Naspark paid an additional $1,000,000.00 into the escrow account. Moreover, the parties established additional terms with respect to the escrow, and provided for the execution of a memorandum of contract (the Memorandum). As with the First Agreement, the Second Agreement did not amend the provision in the Original Contract concerning transfer of furniture and supplies to Naspark.

8. The Memorandum was executed by the parties on September 26, 2003, and recorded three days later in the Office of the City Register of the City of New York pursuant to New York Real Property Law § 294. The exhibit attached to the Memorandum describing the property to be

sold contained only the legal description of the improved parcel of land, and made no reference to the transfer of personal property.

9. Upon filing the Memorandum, petitioner and Naspark prepared and filed a New York City Department of Finance Form NYC-RPT Real Property Transfer Tax Return and a New York State Department of Taxation and Finance Transfer Tax form. The respective schedules on the two forms reported no consideration and no tax liability with respect to the recording of the Memorandum.

10. On October 15, 2003, petitioner and Naspark signed an Amended and Restated Memorandum of Contract of Sale (the Amended Memorandum). The Amended Memorandum documented the extension of the closing date to January 20, 2004 and an additional escrow deposit of $1,000,000.00. As with the Memorandum, the parties filed the New York City and State transfer tax forms corresponding to the Amended Memorandum and reflected no consideration or tax liability with respect to its recording.

11. Prior to the closing, West 63 Empire Associates LLC (West 63) became the successor in interest to Naspark as purchaser of the Empire Hotel. Petitioner and West 63 were also unrelated entities.

12. On January 15, 2004, petitioner and West 63 entered into an agreement with the union representing the employees of the Empire Hotel (the Union Agreement). The Union Agreement stated that "[West 63] does not intend to operate the Hotel in any part, but instead intends to convert the Premises entirely into a permanent residential apartment building." It also provided that:

> "[t]his Agreement . . . is expressly premised and conditioned on the representations by Buyer that it is Buyer's intention that Buyer will be closing the Hotel, make long-term renovations to the Premises and, on later opening, will not own, operate or

> manage a hotel at the Premises. Buyer will operate a permanent residential apartment building on Premises. . . ."

As a result, the Union Agreement provided for severance and benefit packages for the terminated employees.

13. On January 16, 2004, petitioner and West 63 executed the Omnibus Closing Agreement (the Closing Agreement). Paragraph eleven of the Closing Agreement provided: "The value of the personal property that is included in the transaction contemplated by the Purchase Agreement is de minimis, and no part of the Purchase Price is allocable thereto. Any and all sales tax payable to any governmental authority as a result of the transaction contemplated by the Purchase Agreement shall be paid by Purchaser." The Closing Agreement also provided that petitioner was to pay West 63 $1,000.00 per day up to a $200,000.00 maximum for each hotel guest remaining on the property after the closing.

14. Closing on the sale of the Empire Hotel took place on January 16, 2004. Petitioner executed a Bargain and Sale Deed, which conveyed to West 63 the land, buildings and other improvements located at 44-50 West 63rd Street, New York, New York; no reference to tangible personal property appeared in the deed. The Recording and Endorsement Cover Page preceding the deed reflected the payment of a New York State real estate transfer tax in the amount of $313,196.00. This tax was calculated and paid at the rate of 0.4% based upon consideration of $78,299,000.00. None of the consideration was attributed to personal property on the Recording and Endorsement Cover Page.

15. The purchase price shown as paid by West 63 to petitioner on the New York State Office of Real Property Tax Services Real Property Transfer Report was $76,000,000.00. This price was identified on the form as including the personal property transferred. New York State

Real Estate Transfer Tax was calculated and paid based upon consideration of $78,299,000.00, however, because West 63 paid the transfer taxes on the purchase.

16. Prior to December 31, 2003, the book value of the tangible personal property transferred by petitioner contemporaneously with the transfer of the Empire Hotel was $5,184,986.75. On January 1, 2004, petitioner reduced the book value of the tangible personal property in the Empire Hotel to zero. According to the testimony of Steven Kauff, president of the member entity that operated petitioner at the relevant time, this was done as an accounting measure because "there was a definitive contract of sale" and "those assets were sold and disposed of with no tangible value to the company."

17. As part of the closing on January 16, 2004, petitioner executed a Bill of Sale for transfer of the tangible personal property "located at and used or useable in connection with" the Empire Hotel. The Bill of Sale states that the tangible personal property was transferred for consideration of "Ten Dollars ($10.00) and other good and valuable consideration paid. . . ." No sales tax was reported or paid to New York State by either petitioner or West 63 on the transfer of the tangible personal property. Similarly, a Notification of Sale, Transfer or Assignment in Bulk was not filed with the Division of Taxation (Division) at the time petitioner's assets were transferred to West 63.

18. Petitioner and West 63 entered into various other ancillary agreements relating to the sale of the Empire Hotel on January 16, 2004. Included were assignments by petitioner to West 63 of all of its rights and obligations as lessor under existing leases and occupancy agreements at the Empire Hotel, and all of its intangible personal property rights with respect to the Empire Hotel. A notice was also provided on the same date to all tenants of the Empire Hotel informing them that West 63 had assumed all of the rights and obligations of petitioner (including

collection of rents) at or near the time of closing. These and various other documents in conjunction with the sale, such as a Title Affidavit and FIRPTA Certificate, were executed by petitioner at this time.[1]

19. Mr. Kauff testified at hearing about the sale of the Empire Hotel, stating that "[t]o the best of my recollection, the intent of the seller was to dispose of the entirety of the property, lock stock and barrel." When asked on direct examination if the transaction was just the sale of the real property, Kauff answered, "[i]t was a sale of everything related to the Empire Hotel, tangible and intangible."

20. In connection with the acquisition of the Empire Hotel, West 63 hired an architectural firm to develop design plans for the renovation and conversion of the Empire Hotel to a residential condominium apartment building. After closing, and in furtherance of the conversion, the Empire Hotel was closed to the public. In addition, West 63 made severance payments to the Empire Hotel's terminated employees. At the time of the closing, the Empire Hotel was not accepting transitory guests, but did have single-room occupancy tenants remaining in the building.

21. At the time of acquisition, West 63 intended to dispose of the tangible personal property remaining in the Empire Hotel in order to facilitate the conversion to a residential condominium apartment building. Joseph Chetrit, a principal of Naspark and West 63, testified at hearing that petitioner and West 63 "had basically no interest in this furniture." West 63 estimated that it would cost approximately $700,000.00 to remove and discard the furnishings.

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[1] On September 22, 2003, a mortgage foreclosure action was brought in New York State Supreme Court, New York County, against petitioner by the mortgagee of the Empire Hotel. By order of the Court dated October 8, 2003, a receiver was appointed to take possession of and operate the Empire Hotel. This receivership was terminated by court order in conjunction with the closing on January 16, 2004. Nonetheless, the documents referenced in the Findings of Fact above were signed by petitioner, as seller.

22. Instead, West 63 decided to donate the tangible personal property to Maskil-El Dal Inc., a tax exempt, nonprofit charitable organization designed to assist impoverished families. In conjunction with the donation, the tangible personal property remaining in the Empire Hotel was appraised as of December 31, 2003 at $1,058,240.00 by an independent appraiser hired by West 63. The appraisal was entitled "RETAIL REPLACEMENT APPRAISAL FOR CHARITABLE DONATION prepared for Naspark Associates LLC" and identified the property as "399 hotel rooms of furniture and decorations" consisting of "over 5,000 items." Maskil-El Dal Inc. provided West 63 with a receipt for the donation indicating the value of goods received as $1,058,240.00. At the same time, Maskil-El Dal Inc. charged West 63 a fee of $200,000.00 for removal of the tangible personal property and provided a receipt for the service.

23. In 2004, West 63 was a disregarded entity for federal income tax purposes and its activities were reported on that year's U.S. Return of Partnership Income of its member entity, CF Empire LLC (CF Empire). On that return, CF Empire claimed a deduction for charitable contributions to Maskil-El Dal Inc. of $1,258,240.00, consisting of noncash contributions of $1,058,240.00 and cash contributions of $200,000.00. Also on the return, CF Empire described the donated property as "hotel furniture and decorations," stated that it was acquired by purchase on "01/04," and reported the cost as $1,058,240.00; thus indicating that the claimed noncash contributions were the tangible personal property obtained with the Empire Hotel.

24. On July 30, 2004, the Division's auditor, Beverly Forest, issued a letter to petitioner commencing a sales and use tax audit for the period December 1, 2001 through May 31, 2004 and requesting books and records. Initially, the scope of the audit included several areas of inquiry, and all but two were resolved prior to the issuance of a statutory notice. The two that

remained were the Division's investigation of a surplus in petitioner's sales tax accrual account and the bulk sale issue present in this case.

25. In order to determine the proper sales tax due, if any, from the transfer of the tangible personal property in the sale of the Empire Hotel, the auditor attempted to ascertain its fair market value from petitioner's books and records. Upon request, the auditor was provided by petitioner with copies of the relevant contracts, statements of capital expenses for 2001 through 2003, and depreciation schedules for 2002 and 2003. After reviewing the records provided, the auditor concluded that a bulk sale had, in fact, occurred. Moreover, based on the capital expenses schedules, the auditor determined petitioner's book value of the assets transferred to be $5,184,986.75 as of December 31, 2003. She testified that she could not adjust this book value by using the depreciation schedules provided, however, because they lacked sufficient detail. Therefore, she valued the transferred personalty at original cost, or $5,184,986.75.

26. On its 2004 federal income tax return, Morgans Hotel Group LLC (the managing member of petitioner at the time) reported allowable depreciation of the furniture, fixtures and equipment of the Empire Hotel as $4,581,314.00 and a cost basis of $4,955,851.00. There was no breakdown or detail about the assets on the schedule. The 2004 return also showed that for federal income tax purposes, $23,461,408.00 of the sales price for the Empire Hotel was allocated to the land, and $52,538,592.00 was allocated to the building. The gross sales price of the personalty was reported as zero.

27. At the conclusion of the audit, the Division issued a Notice of Determination, dated February 17, 2009, to petitioner asserting $794,822.41 in sales tax and $432,539.53 in interest based on a finding of liability for the two remaining areas under audit. On April 30, 2010, the Division issued a conciliation order resolving the sales tax accrual account issue and reducing the

tax due in the notice to $427,761.41, plus applicable interest.[2] The remaining amount was attributable to the transfer of tangible personal property by petitioner to West 63 in the sale of the Empire Hotel.

28. The assessed tax arising from the transfer of the tangible personal property was erroneously attributed by the Division to the tax period ending May 31, 2003 in the Notice of Determination. The auditor explained at hearing that the mistake was a result of an internal transcription error on her workpapers. This mistake had two effects on the notice. First, the Division understated the amount of tax that would have been assessed had the sale been properly attributed to the tax period ending February 29, 2004, as a higher sales tax rate was in effect for the correct period.[3] Second, the interest asserted in the statutory notice was overstated based on the assignment of the liability to an earlier period.

29. At some point after the close of the audit, petitioner also provided documents relating to the charitable deduction claimed by CF Empire for West 63's donation of the tangible personal property to Maskil-El Dal Inc. Included in this material was the appraisal referenced in Finding of Fact 23, and CF Empire's federal tax return for 2004.

30. The Empire Hotel was never converted to residential condominiums as planned. Eventually, it was reopened as a hotel after a complete renovation, including approximately $3,000,000.00 in new furniture and fixtures. None of the furnishings transferred to West 63 on January 16, 2004 were used in the renovated hotel.

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[2] $367,061.00 of the tax asserted in the statutory notice was associated with the deficiency that the Division claimed based upon a surplus in the sales tax accrual account of petitioner. That tax and corresponding interest was abated by the April 30, 2010 conciliation order.

[3] On June 4, 2003, New York City increased its sales and use tax rate, causing the overall rate applicable here to rise from 8 1/4% to 8 5/8%.

31. Petitioner submitted with its brief proposed findings of fact numbered 1 through 111 pursuant to State Administrative Procedure Act § 307(1). Petitioner's proposed findings of fact 1 through 85 were agreed to by the parties as part of a Stipulation of Facts entered into the record. Hence, all such stipulated facts are incorporated into the Findings of Fact set forth above except for the following: 7, 68, and 69 are rejected as unnecessary to the determination; 84 is rejected as it is a conclusion of law; and 57, 84 and 86 are blank, and therefore do not state a proposed fact. In addition, petitioner's proposed findings of fact numbered 87 through 111 are incorporated into the Findings of Fact set forth above.

SUMMARY OF THE PARTIES' POSITIONS

32. Petitioner argues there was no bulk sale between the companies because West 63 did not purchase business assets from petitioner for consideration, but rather purchased only the real property of the Empire Hotel. Petitioner adds that the only tangible personal property acquired was of de minimis value, and neither party wanted or intended to retain it. Thus, no sales tax obligation arose from the transaction. Additionally, petitioner argues that the statutory notice is flawed as it placed the tax liability in the wrong tax period and, therefore, should not be afforded the usual presumption of correctness. Moreover, petitioner maintains that it is not a person required to collect tax in this instance as a court appointed receiver was managing the Empire Hotel. Finally, if it is determined that a taxable bulk sale took place giving rise to liability, petitioner insists that any sales tax owed should be offset by the previously paid real estate transfer taxes.

33. The Division contends that a bulk transfer of assets took place, and that petitioner, as a vendor, was responsible for reporting and paying sales tax on the transaction. Additionally, the

Division argues that it reasonably estimated the tax due based on the information provided by petitioner.

CONCLUSIONS OF LAW

A. The first issue that must be decided is whether the transfer of the tangible personal property in issue constituted a taxable bulk sale. The term "bulk sale" is defined as:

> any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance (20 NYCRR 537.1[a]).

The definition includes transfers wherein the purchaser need not pay sums of money (***see e.g. Matter of Peconic Bay Motors***, Tax Appeals Tribunal, September 26, 1991), and includes transfers by way of a gift (***see e.g. Matter of Gaughan***, Tax Appeals Tribunal, May 14, 1992). It also applies regardless of whether the seller was operational when the assets were sold (***id***.). The regulatory definition of purchaser includes "any person who, as part of a bulk sale, purchases or is the transferee or assignee of business assets" (20 NYCRR 537.1[e]). Such "business assets" include "any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property" (20 NYCRR 537.1[b]).

The record clearly establishes that, on January 16, 2004, the sale of the Empire Hotel was completed, including transfer of its business assets from petitioner to West 63 outside of the ordinary course of business. The Original Contract specifically called for the transfer of the furniture and supplies to West 63, and such provision was never revised by the parties throughout any of the subsequent amendments. Petitioner's principal, Mr. Kauff, candidly testified that the transaction "was a sale of everything related to the Empire Hotel, tangible and intangible." Petitioner's assertion that zero consideration was attributable to the transfer of such assets is

irrelevant in determining whether a bulk sale took place (***Matter of Ultimat Security, Inc.***, Tax Appeals Tribunal, May 31, 2012). Moreover, it matters not that petitioner was operational when the assets were transferred (***see Matter of Gaughan***). As a result, the transaction between petitioner and West 63 constituted a bulk sale within the meaning of 20 NYCRR 537.1(a).

B. Next, it must be determined how much, if any, sales tax is due from the bulk sale. Tax Law § 1105(a) imposes a sales tax on the receipts of every retail sale of tangible personal property, unless otherwise excluded, exempted or excepted (***see*** 20 NYCRR 537.0[g]). Neither a sales tax return nor bulk sale notification for the transaction was filed by either petitioner or West 63. Thus, pursuant to Tax Law § 1138(a)(1), the Division was authorized to conduct its audit and issue a notice of determination estimating the amount of tax due based on any available information (***see Matter of Saracino***, Tax Appeals Tribunal, June 24, 2010). The crux of this matter is how much value should be attributed to the transferred personalty.

C. Petitioner argues that the contracts call for a zero allocation of the $78,299,000.00 purchase price to the tangible personal property. It insists that neither party wanted the personalty, and that they specifically described it as having de minimis value in the Closing Agreement. Petitioner also points to the fact that the book value of the personalty was zero as of the date of transfer. Moreover, petitioner asserts that the tangible personal property was actually a liability based on the expense of removal. In sum, petitioner insists that even if the personalty was transferred in a bulk sale, its value was negligible and did not give rise to a sales tax liability.

D. Contrary to petitioner's position, however, the Tribunal has repeatedly looked beyond the contracted sales price of assets in a bulk sale in order to determine the value of transferred business assets for sales tax purposes (***see e.g. Matter of Ultimat Security, Inc.***; ***Matter of Suffolk Center Corp.,*** Tax Appeals Tribunal, November 23, 2011; ***Matter of Llargo of***

Lockport, Inc., Tax Appeals Tribunal, August 23, 2010). In the instant case, there are several facts in the record that support the conclusion that the business assets of the Empire Hotel were transferred for more than the zero allocation espoused by petitioner.

First, the parties specifically contracted for the transfer of the personalty from petitioner to West 63 and, despite several amendments, never altered this clause. If, as petitioner argues, the personalty was valueless, such a provision would have been unnecessary. The parties also made provision in their contracts for responsibility for potential sales tax liability, thereby demonstrating that they anticipated such exposure. Additionally, petitioner's book value of the assets was over $5 million throughout the entire contract negotiation with West 63. Only after a firm commitment was reached, and a closing imminent was the book value reduced. As Mr. Kauff explained, this reduction was done simply as an accounting measure as there was a definitive contract of sale in place.

Perhaps most damaging to petitioner's claim of a zero valuation, however, is the independent appraisal and subsequent tax treatment of the sale by West 63's reporting member, CF Empire. On December 31, 2003, West 63's predecessor Naspark was provided with an appraisal of the personalty sold with the Empire Hotel, ascribing to it a value of $1,058,240.00. Relying on this appraisal, CF Empire claimed a deduction for a noncash charitable contribution of $1,058,240.00 on its 2004 federal income tax return for the personalty donated to Maskil-El Dal Inc. Further, on the same return, CF Empire identified the cost of the donated assets as $1,058,240.00. These statements were made by CF Empire under circumstances that could

potentially give rise to its own sales tax liability from the transaction. Hence, this evidence directly contradicts petitioner's assertion that the transferred business assets were of no value.[4]

E. On the other hand, petitioner correctly points out that ascribing a value of $5,184,986.75 to the transferred personalty is unreasonable based on the record. Even the Division's auditor acknowledged at hearing that tangible personal property of the type involved here (furniture and fixtures) depreciates over time. It would be extremely unusual for hotel personalty such as beds and telephones to retain its acquisition value over several years of use. Thus, the Division's use of the original purchase price is an overstatement of the value of the Empire Hotel's assets as of January 2004.

F. Unfortunately for petitioner, however, the scant depreciation documents placed in the record do not clearly and convincingly demonstrate the actual depreciation of the transferred assets. It is well settled that it is the taxpayer's burden of proving by clear and convincing evidence that the assessment or audit methodology is erroneous (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813[1988]; ***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842 [1986]; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858 [1981]). As the Division correctly points out, the depreciation schedules in the record do not provide a breakdown of the transferred assets or contain sufficient itemized detail to be meaningful. While it is obvious that some depreciation occurred, it is unclear from the depreciation schedules provided by petitioner exactly how much was attributed to the subject personalty. Hence,

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[4] Petitioner argues that the appraisal lacks an offset for the $200,000.00 cost of removal paid by West 63 to Maskil-El Dal Inc. A close review of CF Empire's 2004 federal income tax return, however, evidences that CF Empire claimed a cash donation of $200,000.00 as part of its overall donation of $1,258,240.00 to that charity (***see*** Finding of Fact 23). Thus, it is at best unclear as to the true nature of the funds paid by West 63 to Maskil El-Dal Inc.

petitioner has failed to meet its burden on this issue (***see Matter of A.V.S. Laminates, Inc.***, Tax Appeals Tribunal, March 23, 2006).

G. The business assets transferred to West 63 cannot be said to be of merely de minimis value, as petitioner contends. Conversely, it is unreasonable to conclude that the assets in question retained their original value after several years of use, without any adjustment for depreciation, as the Division maintains. Unquestionably, the most probative evidence in this record of the true value of the business assets transferred is the December 31, 2003 appraisal of their value. It is a document independently prepared, offered by petitioner as part of its case, and used by CF Empire in preparation of its federal returns. Indeed, CF Empire identified the cost of the personalty as $1,058,240.00 on its return, thereby belying petitioner's claimed zero allocation. Consequently, it is determined that the consideration for the tangible personal property of the Empire Hotel subject to sales tax is $1,058,240.00 and the statutory notice should be adjusted accordingly.

H. Petitioner also argues that the statutory notice is not entitled to the presumption of correctness because the bulk sale liability was attributed to the wrong taxable period by the Division. It is uncontroverted that the sales tax liability arising from the January 2004 sale of the Empire Hotel was erroneously placed in the sales tax period ending May 31, 2003, rather than the correct period ending February 29, 2004. Nevertheless, the Tribunal has emphasized that the burden of proof is upon the petitioner except as otherwise provided by law, and does not readily shift to the Division absent clear violations of fairness and due process (***see Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990). The law in New York is clear that defects on the face of the notice will not invalidate the notice, absent evidence of harm or prejudice to the petitioner

(***Matter of Agosto v. Tax Commn.***, 68 NY2d 891 [1986]; ***Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000 [1984]; ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989).

Here, there is absolutely no evidence that petitioner was prejudiced by the mistaken information on the face of the notice. Petitioner herein suffered no violation of its due process rights and was accorded the fundamental considerations of fairness. It was afforded a conciliation conference, timely filed its petition, and was able to adequately argue and present evidence on all issues at hearing. Thus, it appears the notice served its purpose, and neither its cancellation nor shifting of the burden of proof to the Division are warranted based on the facial error.

I. It is agreed by the parties, however, that by placing the sales tax liability in the correct taxable period, an adjustment for both the sales tax rate and the amount of interest owed by petitioner is required. A higher sales tax rate was in effect for the taxable period ending February 29, 2004 than the period ending May 31, 2003 (***see*** Finding of Fact 28). Conversely, the amount of interest is reduced by placing the liability in the correct taxable period. Hence, the Division is directed to adjust the deficiency in the statutory notice to accurately reflect the taxable period in which the transaction took place and apply the correct amount of interest.

J. Petitioner contends that if sales tax is owed on the bulk sale of the Empire Hotel, it is entitled to an offset or credit for New York State real estate transfer taxes and New York City real property transfer taxes previously paid under the theories of estoppel and equitable recoupment. First, petitioner's reliance on the principle of estoppel is misplaced. Under the relevant case law, the test for invocation of the estoppel doctrine is whether petitioner had the right to rely on a representation by the Division; whether, in fact, there was such reliance; and whether such reliance was to the detriment of petitioner (***Matter of Harry's Exxon Service***

Station, Tax Appeals Tribunal, December 6, 1988). It has not been alleged, nor do the facts support, that petitioner acted to its detriment by paying the real estate transfer taxes in reliance on an act or representation by the Division. Payment of real estate transfer taxes and nonpayment of sales taxes were acts performed by petitioner on its own accord. Thus, the estoppel doctrine is inapplicable to the instant case.

Petitioner's equitable recoupment claim must also fail.

> The doctrine of equitable recoupment allows a taxpayer against whom a deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency (***National Cash Register Co. v. Joseph***, 299 NY 200, 203). (***Matter of Turbodyne Corp.***, Tax Appeals Tribunal, June 25, 1996, ***confirmed*** 245 AD2d 976, 667 NYS2d 105 [1997], ***lv denied*** 91 NY2d 812 [1998].)

In the case at bar, petitioner is seeking an offset for a different type of tax (real estate transfer tax) from the sales tax deficiency in the statutory notice. As a result, there can be no offset here for the previously paid real estate transfer taxes.

K. Finally, petitioner's argument that it is not a "person required to collect tax" is unsupported by the facts here. Although a court appointed receiver was in place during the time of the sale of the Empire Hotel, all of the pertinent negotiations were performed, and contracts and filings executed, by petitioner, on its own behalf. Thus, it is liable under Tax Law §§ 1131 and 1133 for the sales taxes arising from the sale of the assets of the Empire Hotel.

L. The petition of Empire Holdings LLC is granted to the extent indicated in Conclusions of Law G and I; the Division of Taxation is hereby directed to modify the Notice of Determination issued February 17, 2009 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
September 6, 2012

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE