



HILL WARD HENDERSON
ATTORNEYS AT LAW

Patrick J. Risch
Direct Dial: (813) 227-8466
Email: prisch@hwlaw.com

December 20, 2012

VIA FEDERAL EXPRESS

Department of Revenue
Office of General Counsel
2450 Shumard Oak Boulevard
CCOC 1-2400
Tallahassee, Florida 32399

RECEIVED

DEC 21 2012

DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

Re: McKibbon Hotel Group of Gainesville Florida 2
BPN: 0002144144
Audit#: 200094177
Sales and Use Tax Period: 12/01/2007 - 11/30/2010
Petition for Chapter 120 Administrative Hearing

Dear Sir/Madam:

This law firm represents Petitioner, McKibbon Hotel Group of Gainesville Florida 2 ("Petitioner"), with regard to the above referenced matter. We are in receipt of the Department of Revenue's letter dated October 22, 2012 addressed to John Tillman at McKibbon Hotel Group of Gainesville 2, a copy of which is enclosed for your easy reference. In response thereto, also enclosed please find Petitioner's, Petition for Chapter 120 Administrative Hearing.

Please contact the undersigned directly should you require anything further in this regard.

Very truly yours,

HILL WARD HENDERSON

Patrick J. Risch

PJR/vat
Enclosure

3627542.1

3700 BANK OF AMERICA PLAZA, 101 E KENNEDY BLVD, TAMPA, FL 33602-5195
TEL: 813-221-3900 FAX: 813-221-2900 WWW.HWHLAW.COM

FLORIDA DEPARTMENT OF REVENUE

MCKIBBON HOTEL GROUP OF GAINESVILLE FL 2,

Petitioner.

BPN: 0002144144
Audit No.: 200094177

Sales and Use Tax Period
12/01/2007 – 11/30/2010

PETITION FOR CHAPTER 120 ADMINISTRATIVE HEARING

Petitioner, MCKIBBON HOTEL GROUP OF GAINESVILLE FL 2, by and through its undersigned counsel, respectfully petitions The Florida Department of Revenue ("FDOR") for a Chapter 120 Administrative Hearing, and states as follow:

1. Petitioner is McKibbon Hotel Group of Gainesville FL 2.
2. Petitioner files this Petition pursuant to Section 72.011, 120.569, 120.97 and 120.80(14), Florida Statutes.
3. The FDOR's Notice of Decision was dated October 22, 2012. Petitioner received the Notice of Decision several days later.
4. Petitioner has sent the Petition via overnight delivery to Department of Revenue, Office of General Counsel, 2450 Shumard Oak Boulevard, CCOC 1-2400, Tallahassee, Florida 32399, to be delivered on December 21, 2012. Therefore, the Petition is timely filed.
5. Petitioner's substantial interests are affected by the Notice of Decision as the Notice of Decision purports to uphold an assessment based on an audit assessment concerning whether certain rental charges were exempt from Florida sales tax.
6. Petitioner owns and operates a Homewood Suites by Hilton located in Gainesville, Florida.

7. The FDOR audited for sales tax purposes Petitioner for the period December 1, 2007, through November 30, 2010. (Audit #200094177).

8. Section 212.03, Florida Statutes, generally provides that sales tax is imposed on the rental of sleeping accommodations.

9. Section 212.08 provides that certain nongovernmental entities are exempt from the imposition of sales tax.

10. To qualify for an exemption from sales tax under section 212.08, the exempt entity must obtain a sales tax exemption certificate from the FDOR or produce some other documentation as required by the FDOR and the rental charges or room rates are billed directly to and paid directly by the exempt organization pursuant to FAC 12A-1.061(14).

11. In order to comply with these conditions when renting to a purported exempt entity, Petitioner developed procedures at its facility to ensure compliance.

12. Petitioner requires that its employees request and examine the exemption certificate and confirm with the hotel guest that the rental charges are billed directly to and paid by the exempt entity. Furthermore, as required the Petitioner keeps a copy of the exemption certificate on record.

13. FAC 12A-1.061(14)(b)1.c. further provides that FAC 12A-1.038(3) and (4) list the proper documentation the employee or representative of the exempt entity needs to provide to obtain the sales tax exemption.

14. Code provision 12A-1.038(3) and (4), F.A.C. provide a Consumer's Certificate of Exemption (Form DR-14) copy may be provided to an entity such as Petitioner when an exempt rental occurs.

15. 12A-10.38 provides in subsection (6) for certain records required for selling dealers such as Petitioner. Petitioner maintains those records required and made those available during the audit. Nowhere in this records requirement does it state that Petitioner must maintain copies of documents to show that the exempt entity was in fact billed directly.

16. The FDOR determined that some sales reported as exempt from sales tax were not exempt, Petitioner disagrees with this finding.

17. As a result of this audit, the FDOR issued an assessment in the amount of \$19,868.77.

18. Petitioner disputes that an amount of \$9,909.54 is owed based on the audit. Petitioner has paid the amount not contested, plus interest and any applicable penalties on or about December 20, 2012.

19. The FDOR found some sales exempt based on purported findings that the Petitioner either did not have any documentation to support the exempt nature of these sales or had the proper documentation, but not could not demonstrate that the tax-exempt entity's funds paid for an individual's hotel stay. The Petitioner disagrees with these findings.

20. Additionally, Petitioner's related companies which also operate hotels were previously audited by the FDOR and were not assessed for this issue.

21. Those related entities maintained the same type of records as Petitioner and employed the same exact verification policy as Petitioner and were not assessed for this issue.

22. Pursuant to section 213.21(3)(b), Florida Statutes, doubt as to liability exists when the taxpayer reasonably relied on previous written determinations by the FDOR.

23. Petitioner contends the FDOR has misapplied section 212.08, 212.21(3)(b), and 12A-1.061(14), and 12A-1.038 as it applies to Petitioner. When those rules are applied properly,

the assessment should be 0 as Petitioner legally complied with the verification process for renting to an exempt entity and maintained all legally required records. If additional records were necessary to support the sales tax exemption, the FDOR should have promulgated the rules it believed were necessary to do so and Petitioner should not be penalized for complying with the laws as written during this audit period.

24. Petitioner requests that the audit results be reversed and it be determined that Petitioner owes \$0 in assessments as a result of the audit performed from December 1, 2007 through November 30, 2010.

Dated: December 20, 2012



Patrick J. Risch - Florida Bar No. 0165603
Hill, Ward & Henderson, P.A.
101 E. Kennedy Boulevard, Suite 3700
Tampa, Florida 33601
Telephone: (813) 221-3900
Facsimile: (813) 221-2900
Attorneys for Plaintiff
prisch@hwlaw.com
val@hwlaw.com, cboyd@hwlaw.com



Interim Executive Director Marshall Stransburg

10/22/2012

John Tillman
Mckibbon Hotel Grp Of Gainesville FL 2
440 Washington Street
Gainesville, GA 30501-3619

HWS

Re: Notice of Decision
MCKIBBON HOTEL GRP OF GAINESVILLE FL 2
BPN: 0002144144
Audit #: 200094177
Sales and Use Tax
Period: 12/01/2007 - 11/30/2010

Table with 3 columns: Description, Dollar sign, Amount. Rows: Proposed Assessment Amount: \$ 19,123.65; Sustained Amount: \$ 19,123.65; Balance Due: \$ 19,868.77

*Includes payments and updated interest through 10/22/2012. Interest continues to accrue at 3.04 per day until the postmark date of payment. Daily interest is subject to change every January 1 and July 1.

Dear Mr. Tillman:

This is the Department's response to the protest letter postmarked 06/18/2012, filed against the referenced assessment. The letter of protest, the case file, and other available information have been carefully reviewed. This reply constitutes the issuance of our Notice of Decision, pursuant to the provisions of Rule 12-6.003, F.A.C. It represents our position based on applicable law to the issues under protest.

ISSUE

Whether McKibbon Hotel Group of Gainesville Florida #2, LP (Taxpayer) has demonstrated that the rental charges that were captured in its audit assessment are exempt from Florida sales tax.

FACTS

Taxpayer owns and operates a Homewood Suites by Hilton hotel in Gainesville, Florida. Taxpayer's hotel was audited by the Department for sales tax purposes for the period December 1, 2007, through November 30, 2010. During this audit, the Department examined the hotel's

Child Support Enforcement - Ann Coffin, Director • General Tax Administration - Maria Johnson, Director
Property Tax Oversight - James McAdams, Director • Information Services - Tony Powell, Director

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Tallahassee, Florida 32399-0100

sales and purchases. The Department determined that Taxpayer was unable to demonstrate that some of its room sales (rentals) that it reported as exempt sales were exempt from Florida sales tax. Taxpayer either did not have any documentation to support the exempt nature of these sales or had a consumer's certificate of exemption, but could not demonstrate that the tax-exempt entity's funds paid for an individual's hotel stay. Accordingly, the Department's auditor disallowed these exempt sales and assessed Taxpayer on these sales. This assessment is reflected in the Department's audit workpapers as *Exhibit A01 - Disallowed Exhibit Room Folios*. No other assessment was made in this audit.

Taxpayer disagreed with the Department's findings and protested this assessment. During the informal protest, the Department held two telephone conferences with Taxpayer. Taxpayer confirmed in the second conference that its only audit issue is with the documentation requirements for demonstrating that it made an exempt room sale to its nongovernmental customers.

TAXPAYER ARGUMENT

Taxpayer offers that it has demonstrated that the sales in question are exempt from Florida sales tax, because it followed the documentation requirements of the Department's rules. Specifically, Taxpayer provides that it has a company-wide website for its front desk personnel that contains information related to tax-exempt sales, which was taken directly from the Department's rules. Accordingly, Taxpayer offers that it has acted in good faith regarding the documentation requirements of its sales to nongovernmental entities and should not have been assessed for this issue.

Taxpayer also offers that its group has had other hotel properties that have been audited by the Department and either received "No Change" audit results or the exempt sales were not an audit issue. Taxpayer provides that based on audit results of its other related hotel properties, it acted in good faith with regard to the property currently at issue. Accordingly, the Department should remove those sales to nongovernmental entities where Taxpayer presented the entities exemption certificate, which was in line with the Department's rules.

DISCUSSION

Section 212.03, F.S., as a general rule, imposes Florida state sales tax at the rate of six percent (6%)¹ on the privilege of engaging in the rental of sleeping accommodations. *See* s. 212.03(1)(a), F.S. The tax is imposed on the total rental charged. *See* s. 212.03(2), F.S. Rental charges include the total consideration received for the use of the accommodation, provided that such amounts are required to be paid by the guest as a condition of the use or possession of the accommodation. *See* Rule 12A-1.061(3)(b)1., F.A.C.

Exemptions to the general rule are found in the various subsections of Section 212.08, F.S. For certain nongovernmental entities to be entitled to such exemptions, s. 212.08(7), F.S., states:

¹Discretionary county sales surtax, if any, as well as local transient rental tax(es), if any, are also owed on the transient rental charge if the six percent (6%) Florida state sales tax applies. *See* ss. 125.0104, 125.0108, 212.0305, and 212.054, F.S.

Exemptions provided to any entity by this chapter do not inure to any transaction that is otherwise taxable under this chapter when payment is made by a representative or employee of the entity by any means, including, but not limited to, cash, check, or credit card, even when that representative or employee is subsequently reimbursed by the entity. In addition, exemptions provided to any entity by this subsection do not inure to any transaction that is otherwise taxable under this chapter unless the entity has obtained a sales tax exemption certificate from the department or the entity obtains or provides other documentation as required by the department. Eligible purchases or leases made with such a certificate must be in strict compliance with this subsection and departmental rules, and any person who makes an exempt purchase with a certificate that is not in strict compliance with this subsection and the rules is liable for and shall pay the tax. The department may adopt rules to administer this subsection.

As indicated above, a nongovernmental entity is only exempt from tax when it: 1) pays for the purchase with its funds directly to the seller; and, 2) obtains a sales tax exemption certificate from the Department or provides other documentation as required by the Department.

In the instant case, Taxpayer engaged in the rental of sleeping accommodations, as contemplated by s. 212.03, F.S. Therefore, tax is due on the room rental charged by Taxpayer to the entities in question, unless Taxpayer can prove that these charges are exempt. Taxpayer claims that the room rental charges are exempt from tax, because it rented rooms to tax-exempt entities and followed the documentation requirements of the Department's rules to demonstrate that these sales are exempt from tax.

The Department's Rule 12A-1.061(14)(b)1., F.A.C., provides that authorized representatives of entities that hold a consumer's certificate of exemption issued by the Department are exempt from tax on rental charges for sleeping accommodations when: 1) the rental charges are billed directly to and paid directly by the exempt entity; 2) the entity's representative does not use the accommodations for personal use; and 3) the entity's representative provides the person providing the sleeping accommodations with its consumer's certificate of exemption².

In the present case, Taxpayer presented evidence that one of its policies and procedures provides that its employees are only to exempt when the rental charges are billed directly to and paid directly by the tax-exempt entity, which is consistent with the Department's rule. However, the rental charges that were scheduled in the audit were not billed directly to a tax-exempt entity. The invoices examined indicate that the charges were billed to the individual representatives of the entity and not directly to the entity itself. Furthermore, Taxpayer was unable to demonstrate that the entity paid the Taxpayer directly for the rental charges and, for some of the rentals, Taxpayer was unable to prove that the individual staying at the hotel was a representative of a tax-exempt entity. Therefore, Taxpayer is liable for the tax on the rental charges in question.

Taxpayer also claims that it should not have been assessed for the rental charges in question, because other hotels in its group that have been audited by the Department were not assessed for this issue. Section 213.21(3)(a), F.S., authorizes the Department to compromise tax or interest

² See Rule 12A-1.038(3), F.A.C., for documentation requirements in lieu of providing an exemption certificate.

when doubt as to liability for such tax or interest exists. Section 213.21(3)(b), F.S., provides that doubt as to liability exists when a taxpayer demonstrates that it reasonably relied on a written determination of the Department.

The Department's Rule 12-13.005, F.A.C., clearly states that for a taxpayer to establish that it received a written determination relative to an issue in question, the audit workpapers from a prior audit of the same taxpayer must clearly indicate that the same issue in its current audit was considered in its prior audit. In the instant case, Taxpayer presented partial audit results from six of Taxpayer's related entities' audits. None of these audits results were for Taxpayer. Therefore, no prior written determination for the issue in question exists. Accordingly, doubt as to liability does not exist for the rental charges Taxpayer made to various tax-exempt nongovernmental entities.

CONCLUSION

Taxpayer has not demonstrated that the sales that were captured in its audit assessment are exempt from Florida sales tax. The audit assessment is sustained.

Enclosed for your convenience is an audit remittance coupon. Payment, including interest to the postmark date of payment, should be returned in the enclosed envelope, along with the audit remittance coupon. The check should reflect the audit number.

TAXPAYER APPEAL RIGHTS

This Notice of Decision constitutes the final position of the Department unless a Petition for Reconsideration is filed on a timely basis, in which event the Notice of Reconsideration will be the Department's final position. The requirements for a Petition for Reconsideration are set forth below.

Pursuant to Section 72.011(2), F.S., and Rule Chapter 12-6, F.A.C., the assessment is final as of the date of this Notice of Decision unless you file a written Petition for Reconsideration postmarked within thirty (30) days of the date of this Notice of Decision and addressed to Technical Assistance and Dispute Resolution, Post Office Box 7443, Tallahassee, FL 32314-7443. The Petition for Reconsideration must contain new facts or arguments; otherwise, it is subject to dismissal.

Absent a timely-filed Petition for Reconsideration, the assessment reflected in the Notice of Decision is final, and you have three alternatives for further review:

1) Pursuant to Section 72.011, F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in circuit court by filing a complaint with the clerk of the court. **THE COMPLAINT MUST BE RECEIVED BY THE CLERK OF THE CIRCUIT COURT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION.** Section 72.011(3), F.S., provides that no circuit court action may be brought unless you pay to the Department the amount of taxes, penalties, and accrued interest assessed by the Department that are uncontested and tender or post a bond for the remaining disputed amounts unless a waiver is granted, as provided in that section. Failure to pay the uncontested amounts will result in the dismissal of the action and

Notice of Decision
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imposition of an additional penalty in the amount of twenty-five percent (25%) of the tax assessed. The requirements of Chapter 72, F.S., are jurisdictional;

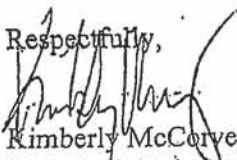
2) Pursuant to Sections 72.011, 120.569, 120.57, and 120.80(14), F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668. **THE PETITION MUST BE RECEIVED BY THE DEPARTMENT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION.** The petition should conform to the requirements of the Uniform Rules promulgated pursuant to Section 120.54(5), F.S. Section 120.80(14), F.S., provides that before you file a petition under Chapter 120, F.S., you must pay to the Department the amount of taxes, penalties, and accrued interest that are not being contested. Failure to pay those amounts will result in the dismissal of the petition and imposition of an additional penalty in the amount of twenty-five percent (25%) of the tax assessed. Mediation pursuant to Section 120.573, F.S. is not available. The requirements of Section 72.011(2) and (3)(a), F.S., are jurisdictional for any action contesting an assessment or refund denial under Chapter 120, F.S.; OR

3) Pursuant to Section 120.68, F.S., you may contest the assessment in the appropriate district court of appeal by filing a Notice of Appeal meeting the requirements of Rule 9.110, Florida Rules of Appellate Procedure, with i) the Clerk of the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668 and ii) with the clerk of the appropriate district court of appeal, accompanied by the applicable filing fee. **THE NOTICE OF APPEAL MUST BE FILED WITH BOTH THE DISTRICT COURT OF APPEAL AND THE DEPARTMENT OF REVENUE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS NOTICE OF DECISION.**

For appellate review purposes, the Department will treat factual matters asserted in a protest or petition for reconsideration as allegations, not as established facts.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

Respectfully,


Kimberly McCorvey
Technical Assistance & Dispute Resolution
(850)717-7068

Enclosure: Audit Remittance Coupon

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceeding before the Technical Assistance and Dispute Resolution Office should contact that office at 850-617-8346, or you may also call via the Florida Relay System at 800-955-8770, at least five working days before such proceeding.