

**THE CITY OF NEW YORK
DEPARTMENT OF FINANCE**

NOTICE OF RULEMAKING

Pursuant to the power vested in me as Commissioner of Finance by sections 389(b) and 1043 of the New York City Charter and section 11-2511(1) of the Administrative Code of the City of New York, I hereby promulgate the within amendment to the Rules Relating to the New York City Hotel Room Occupancy Tax.

/S/ Andrew S. Eristoff
Commissioner of Finance

THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

Section 1. Subdivision (b) of the definition of occupancy in section 12-01 of such rules is amended to read as follows:

(b) A room is deemed to be the subject of only one taxable occupancy at a given time. Where an occupant sublets or otherwise contracts away his right to the use or possession, the tax shall be collected and paid in accordance with the following rules:

(1) [If] (i) For taxable periods beginning before June 1, 2002, if the original occupant is [himself] itself an operator, as in the case of a private club located in a hotel, and subleases the occupancy to another, the taxable occupancy shall be the occupancy by the sublessee. In such case, the original occupant shall collect the tax from the sublessee and pay it over to the [City]Commissioner of Finance.

(ii)For taxable periods beginning on or after June 1, 2002, if the original occupant or any sublessee of the room is directly or indirectly related to the original hotel operator, the taxable occupancy will be the occupancy by the sublessee of such related person. For purposes of this subparagraph (ii) an occupant will be considered to be directly or indirectly related to the original hotel operator if:

(A) the original hotel operator owns directly or indirectly a five percent or greater interest in such occupant,

(B) such occupant owns directly or indirectly a five percent or greater interest in the original hotel operator,

(C) one or more persons own directly or indirectly five percent or greater interests both in such occupant and in the original hotel operator, or

(D) such occupant is an officer, director, manager (including a manager of a limited liability company,) trustee, fiduciary or employee of the original hotel operator or an individual that is a member of the family of an individual original hotel operator.

(E) For purposes of this subparagraph a five percent or greater interest shall mean, in the case of a corporation, five percent or more of the voting power of all classes of stock or five percent or more of the total fair market value of all classes of stock, and, in the case of a partnership, association, trust or other entity, five percent or more of the capital, profits or beneficial interests in such entity.

(F) To illustrate:

Illustration 1: In 2003, Z contracts for 100 rooms in a hotel at a rate of \$100 per room per day for 190 consecutive days. Z subleases the rooms to its customers. Z is not a private club and is not related to the hotel operator within the meaning of this paragraph.

The hotel operator is required to charge and collect the tax from Z for its occupancy of all 100 rooms for the entire 190-day period. Z is not a permanent resident with respect to any of the rooms. See section 12-01 definition of a "permanent resident," paragraph (3), of these rules. Z is not required to charge and collect the tax from its customers for the occupancy of any of the rooms that it subleases for the days that such rooms are sublet.

Illustration 2: The facts are the same as in Illustration 1 except that Z is related to the hotel operator within the meaning of this paragraph. In this case, the taxable occupancy is the occupancy by the customers of Z and the hotel operator is required to charge and collect the tax from the customers of Z.

(2) [If] (i) For taxable periods beginning before June 1, 2002, if the original occupant is not an operator, [his] the occupant's occupancy is taxable whether or not [he] the occupant has the actual use or possession of the room and no tax will be paid by or collected from [the] a sublessee of the occupant.

(ii) For taxable periods beginning on or after June 1, 2002, except as provided in subparagraph (ii) of paragraph (1), the occupancy of the original occupant is taxable whether or not the original occupant has the actual use or possession of the room and no tax will be paid by the person having actual use or possession of the room. See subdivision (b)(ii) of the definition of "occupancy," supra, in this section for the application of the tax to the occupancy by a sublessee of an occupancy that is related to the hotel operator.

§2. The definition of operator in such section is amended to read as follows:

(1) An "operator" is any person operating a hotel in the City of New York, including, but not limited to, the owner or proprietor of such premises, lessee, sublessee, mortgagee in possession, licensee or any other person otherwise operating such hotel. For taxable periods beginning on or after June 1, 2002, a private club that, as an accommodation to its members, makes rooms available to such members in its own buildings is an "operator" within the meaning of the law.

(2) [Any] For taxable periods beginning before June 1, 2002, any person who contracts away the use of a room or rooms in a hotel is an "operator." For example, a private club which, as an accommodation to its members, makes rooms available to such members either in its own buildings or in club rooms maintained in a hotel elsewhere, is an "operator" within the meaning of the law. For taxable periods beginning on or after June 1, 2002, any occupant who sublets or

otherwise contracts away the right to use or possession of a room or rooms in a hotel is not an operator.

§3. The definition of permanent resident in such section is amended to read as follows:

Permanent resident.

(1) A person is a "permanent resident" as of a given date if [he] that person has occupied or has had the right to occupy a room or suite of rooms in a particular hotel for 180 consecutive days next preceding such date. (Prior to September 1, 1980, 90 days of occupancy qualified a person as a "permanent resident"). A person who enters into an agreement for occupancy for 180 consecutive days or more does not become a permanent resident under the law until [he] that person has been an occupant for 180 consecutive days, and the operator is liable for the collection of the tax until such occupancy for 180 consecutive days has been completed. Where the tax has been collected by the operator for occupancy for less than 180 days and the occupant subsequently completes 180 consecutive days of occupancy, the operator may return such tax to the occupant. If the operator has paid such tax over to the [City]Commissioner of Finance, [he] the operator may, within one year from the date of the payment to the Commissioner of Finance, and provided [he] the operator has returned such tax to the occupant, either take credit for the tax so paid on any subsequent return filed by [him] the operator or file a claim for refund of such tax.

(2) A person is not a permanent resident as of a given date unless [he] that person has completed 180 days of consecutive occupancy in the same establishment immediately prior to that date. Thus, a person who has the right to use a room only on intermittent days of the week or of the month is not a permanent resident even though [he] that person has had more than 180 days of occupancy in the aggregate. Similarly, a person who, after having been a permanent resident, surrenders his occupancy and then subsequently resumes [his] its occupancy, is not a permanent resident under the later occupancy until [he] that person completes 180 additional consecutive days of occupancy. Where a person transfers from one hotel to another, even though owned or operated by the same operator, [he] that person is not a permanent resident of the latter establishment until [he] that person has completed 180 consecutive days of occupancy therein. However, except as provided in subdivision (3) of this definition, a person who has completed 180 consecutive days of occupancy in different rooms of the same hotel is a permanent resident of that establishment. Where a permanent resident rents additional rooms on a temporary basis, [he] that person is not considered a permanent resident with respect to such additional rooms unless such rooms are occupied for 180 or more consecutive days.

(3) For purposes of the definition of permanent resident, days of consecutive occupancy shall not include any day that a person sublets or otherwise contracts away such person's occupancy of a room or rooms regardless of whether than person is an operator with respect to the subleasing of that room. If a person leases more than one room in a hotel that such person has sublet on some days, such person may not aggregate the days that it has

not sublet any such room with the days that it has not sublet any other such room in order to qualify for permanent resident status. See illustration (vii) below.

To illustrate:

- Illustration (i):* A person occupies a certain room in a hotel for 57 days. On the 57th day [he] that person moves to a different room in the same hotel, which [he] that person occupies for an additional 130 days. This person is considered a permanent resident with respect to the occupancy of both rooms and [he] that person is entitled to a refund of any tax paid with respect to the occupancy of the rooms.
- Illustration (ii):* An airline corporation rents three rooms on an annual basis from a hotel. However, on occasion, when it requires additional rooms in the hotel for the use of its employees, it rents such additional rooms on a daily basis for a period less than 180 consecutive days. The hotel is required to charge and collect the tax from the airline corporation on the [rental charges for] airline's occupancy of the additional rooms.
- Illustration (iii):* B, an individual, resides in a hotel where [he] that person has occupied a two-room suite for a period exceeding 180 consecutive days. B also rents a studio room for his own use in practicing piano. B has the exclusive use of this studio for a period of one hour per week. At other times, the room may or may not be rented to other persons. [The charge made by the hotel to B for the] B's use of the studio room is subject to the tax.
- Illustration (iv):* C, an individual, occupies a room in a hotel for a period of 180 days. He also rents two additional rooms for occupancy by his wife and his maid for a period of two weeks. The room occupied by his wife adjoins his room and the room occupied by his maid is on another floor of the hotel. The hotel operator is required to charge and collect the tax from C on the [rental charge for] occupancy of the rooms occupied by C's maid and his wife.
- Illustration (v):* D, an individual, occupies a room in a hotel for a period of more than 180 consecutive days. He rents an additional room in the same hotel for one day for the purpose of holding a party for his friends. The hotel is required to charge and collect the tax from D [on the rental charge] for the occupancy of the additional room.
- Illustration (vi):* A corporation maintains a suite of rooms at a hotel on a permanent basis. During one week of the year, it holds a general sales meeting and for that purpose rents 75 additional rooms in the same hotel for the use of its employees. The hotel operator is required to charge and collect the tax from the corporation [on the rental charges] for the occupancy of the 75 additional rooms.

Illustration (vii):

Z, a tour company, contracts for 100 rooms in a hotel for 190 consecutive days. Z subleases 98 of the 100 rooms to its customers. Each of the 98 rooms is sublet for most of the 190-day period. However, there is no single day within the 190-day period on which all 98 rooms are sublet. Z uses the remaining two rooms to conduct its business. It does not sublease either of the two rooms for any period of time.

Z becomes a permanent resident of the two rooms used to conduct its business when it completes 180 days of consecutive occupancy and is entitled to a refund of any tax paid with regard to the occupancy of these two rooms. Z does not become a permanent resident with respect to any of the 98 rooms that it subleases to customers even though at least one of the rooms is unoccupied for each of the 190 days.

§4. The amendments made by sections 1 through 3 shall apply to all taxable periods beginning on or after June 1, 2002.

BASIS AND PURPOSE OF AMENDMENTS

These amendments affect the portion of the Rules Relating to the New York City Hotel Room Occupancy Tax governing the definitions of occupancy, operator and permanent resident.

These amendments address the application of the tax to persons who rent rooms from a hotel operator and sublet them to others. These amendments are designed to ensure collection and payment of the appropriate amount of tax without imposing any undue burden on hotel operators and other participants in the tourism industry.

The amendments modify the definition of taxable occupancy to provide that if a person rents one or more hotel rooms from an operator and sublets them, the taxable occupancy is the original occupancy and the original hotel operator is required to collect the tax from the original occupant. The purpose of this amendment is to avoid the compliance problems where hotel rooms are sublet as part of a package including other services such as transportation, entertainment, etc. However, to prevent hotel operators from avoiding the tax through sublet arrangements with affiliates, where a hotel operator rents a room to a person related to the original hotel operator who then sublets that room, the taxable occupancy is the occupancy by the person who sublets the room from the related person. In this case the original operator must charge and collect the tax from the sublessee of the related person. The amendments provide that these anti-abuse provisions will apply where a five percent or more ownership relationship exists between the sublessor and the hotel operator.

The amendments also modify the definition of an operator so that a person who sublets hotel rooms is no longer defined as an operator. Thus, under the amendments, sublessors of hotel rooms will no longer be obligated to register as operators or file returns.

Finally, the amendments modify the definition of a permanent resident to provide that an occupant of a room that sublets the room will not be treated as a permanent resident with respect to any day that the room is sublet. In addition, the occupancy by such a sublessor of multiple rooms in the same hotel on days when such rooms are not sublet may not be aggregated so as to qualify the sublessor as a permanent resident.

To ensure that all affected parties are aware of the amendments, these amendments will not take effect before June 1, 2002. However, nothing in these amendments or the prospective effective date is to be construed as affecting in any way the obligation of persons who sublet hotel rooms under the rules in effect prior to the effective date of these amendments.

These amendments also make certain nonsubstantive changes to the illustrations contained in the rules.

/S/ Andrew S. Eristoff

Commissioner of Finance