

04-1 August 24, 2004

## **FINANCE MEMORANDUM**

### **SETTLEMENT OF OUTSTANDING LIABILITIES OF SMALL FACILITY OPERATORS**

#### **I. BACKGROUND**

The New York City Hotel Room Occupancy Tax ("HROT") applies to the occupancy of any room in a hotel in the City. In October 2003, the Department of Finance adopted rules clarifying the application of the HROT to bed & breakfast operations operated in a person's residence. Because those rules represent a clarification of existing law, those rules apply retroactively to all open periods. The new rules also clarified the application of the tax to the rental of apartments to guests on a transient basis. Those rules also repealed the exception for the rental of living units for one week or more, for periods beginning on December 1, 2003, and thereafter. In conjunction with the adoption of the new rules, the Department offered an amnesty program for small hotels. That amnesty program was available only to owners and operators of hotels having fewer than 10 rooms. Bed & breakfasts operated in private residences and individual apartments rented to guests on a transient basis also were eligible for this program if they had fewer than 10 rooms.

Several operators and owners of apartments rented to guests contacted the Department either directly or through their representatives regarding the new rules and the amnesty program. They raised issues regarding the effectiveness of the Department's outreach efforts regarding the small hotel amnesty and regarding the application of the new rules for past periods. They also raised questions regarding the level of activity necessary to trigger the tax and other related issues. After consideration of the issues raised, the Department will propose amendments to the HROT rules establishing guidelines for when a person will be considered to be subject to the tax and establishing an annual, instead of quarterly, filing requirement for small facility operators. *See*, Rulemaking Actions on the Department's website at [www.nyc.gov/finance](http://www.nyc.gov/finance). In addition, the Department has agreed to offer to settle, on the terms set forth below, outstanding liabilities for HROT for bed & breakfast operators and owners of apartments rented to guests on a transient basis.

#### **II. SCOPE**

This Finance Memorandum establishes guidelines for resolving HROT liabilities of operators of bed & breakfasts and transient apartment lessors for periods prior to March 1, 2005 ("Outstanding Liabilities").

The settlement procedures set forth below ("Settlement Procedures") will not be available for resolving refund claims for any period.

The Settlement Procedures will not apply to liabilities for taxes due for periods beginning on and after March 1, 2005.

The Settlement Procedures also will not be available to any person that has collected the tax but has failed to pay over the tax to the Department with respect to any occupancy of rooms or apartments during any period ending on or before August 31, 2003.

### III. WHO IS ELIGIBLE

The Settlement Procedures will be available to an Eligible Operator, which is defined as:

1. An operator of a bed & breakfast in which fewer than 10 rooms are offered for occupancy by guests. For this purpose, a bed & breakfast is a dwelling place ordinarily occupied by a person as his or her own dwelling in which more than one room is regularly used and kept open by such person for the lodging of guests for consideration, regardless of whether services such as meals, telephone or linen services are provided;
2. An operator of any other hotel having fewer than 10 rooms; or
3. An owner or lessee of any number of furnished living units or apartments intended for single-family occupancy that the owner or lessee regularly uses and keeps open for lodging of guests on a transient basis for consideration, regardless of whether services, such as meals, telephone or linen services are provided.

For this purpose, rooms, apartments, and furnished living units will not be considered to be regularly used and kept open for the lodging of guests if, during any four consecutive quarterly periods, rooms, apartments or living units were not rented to guests or occupants on three or more occasions or for more than 14 days in the aggregate. If an operator or owner exceeds this threshold, the operator will be considered subject to the tax for that and all subsequent periods for purposes of the Settlement Procedures. For owners and lessees of furnished living units or apartments exempt from the tax for periods prior to December 1, 2003 under the "bungalow" exception (Title 19 Rules of the City of New York §12-01, definition of "hotel" (4)), the above threshold will apply only for periods beginning on and after that date.

### IV. SETTLEMENT PROCEDURES

To settle Outstanding Liabilities, any Eligible Operator must, **on or before March 20, 2005**:

1. Register with the Department as an operator using either the form attached hereto, or any other registration form provided by the Department.
2. Submit a signed closing agreement in the form attached hereto as Exhibit I or such other equivalent form as the Department may, in its discretion, accept.
3. Pay (a) any amounts actually collected from guests during periods beginning on and after September 1, 2003 and before March 1, 2005, with interest and (b) pay an amount equal to the lesser of (i) \$500 for each room or apartment currently offered for occupancy to guests by such Eligible Operator, and (ii) the amount of tax that should have been collected based on the

taxpayer's books and records for periods prior to March 1, 2005, plus, in either case, interest from September 1, 2004.

4. Submit a signed certification of eligibility and of compliance with all current obligations to collect and pay over to the Department HROT with respect to all taxable occupancies of rooms and apartments as provided in the applicable rules for taxable periods beginning on and after March 1, 2005, in the form attached hereto as Exhibit II.

All registration forms, closing agreements, certifications and checks should be sent to:

New York City Department of Finance  
Office of Legal Affairs  
345 Adams Street, 3<sup>rd</sup> Floor  
Brooklyn, NY 11201  
Attn: Bed & Breakfast Settlement

EXHIBIT I

**CLOSING AGREEMENT**

**WHEREAS** the taxpayer identified in the attached certification (hereafter identified as the "Taxpayer") and the New York City Department of Finance (the "Department") wish to settle and resolve the Taxpayer's liability for Outstanding Liabilities (as defined in Finance Memorandum 04-1).

**NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED** by and between the Taxpayer and the Department that:

1. The Taxpayer's Outstanding Liabilities for New York City Hotel Room Occupancy Tax ("HROT") are \$ \_\_\_\_\_ ("Final Liability").
2. The Final Liability shown in paragraph 1 is currently due and owing and the Taxpayer will pay the said liability pursuant to the terms stated in paragraph 3 hereof without protest.
3. The Taxpayer has delivered to the Department a check made payable to the "New York City Department of Finance" for the Final Liability shown in Paragraph 1 with interest (compounded as provided in Code section 11-2515) from September 1, 2004 to a date ten days prior to the date such check is delivered to the Department.
4. The Taxpayer has delivered to the Department a check made payable to the "New York City Department of Finance" for \$ \_\_\_\_\_, representing 100 percent of all amounts of HROT actually collected from guests during periods beginning on and after September 1, 2003, with interest (compounded as provided in Code section 11-2515) from the due date thereof to a date ten days prior to the date such check is delivered to the Department.
5. This Agreement shall not be binding on either the Taxpayer or the Department until signed by both the Taxpayer (or its authorized representative) and the Commissioner of Finance (or his or her authorized representative). The Taxpayer and the Department hereby represent that the persons signing below are duly authorized to sign on behalf of their respective parties. If an authorized representative signs this Agreement on behalf of the Taxpayer, a fully executed Power of Attorney must be attached hereto authorizing such representative to sign this Agreement.
6. This Closing Agreement is final, conclusive and irrevocable, except upon a showing of fraud, malfeasance or misrepresentation of material fact contained herein or in the certification attached hereto

that induced the Department to enter into this agreement. The Taxpayer hereby waives any and all right to or claim for credit/refund of all or any part of any payment of HROT whether heretofore paid or to be paid hereunder. Taxpayer waives any and all rights to protest the amounts paid under paragraphs 3 and 4 hereof before the Conciliation Bureau of the Department of Finance, the New York City Tax Appeals Tribunal or otherwise.

7. This Closing Agreement is strictly confidential and not for disclosure, publication or release unless such disclosure, publication or release is required by law.

8. This Closing Agreement when fully executed shall be binding upon and inure to the benefit of the parties hereto and their administrators, successors and assigns.

9. The Department of Finance and the Taxpayer hereby certify that they have read this Closing Agreement and accept its terms.

**IN WITNESS WHEREOF**, the parties have executed this Closing Agreement on the dates shown below.

COMMISSIONER OF FINANCE

By: \_\_\_\_\_

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

TAXPAYER

By: \_\_\_\_\_

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

EXHIBIT II

CERTIFICATION

\_\_\_\_\_, having EIN:  
\_\_\_\_\_, (hereafter identified as the "Taxpayer") hereby certifies under penalties of perjury as follows:

1. The Taxpayer is (initial one):

- An operator of a bed & breakfast in which fewer than ten (10) rooms are offered for occupancy by guests. For this purpose, a bed & breakfast is a dwelling place ordinarily occupied by a person as his or her own dwelling in which more than one room is regularly used and kept open by such person for the lodging of guests for consideration, regardless of whether services such as meals, telephone or linen services are provided;
- An operator of any other hotel having fewer than ten (10) rooms offered for occupancy by guests; or
- An owner or lessee of one or more furnished living units or apartments intended for single-family occupancy that the owner or lessee rents to guests on a transient basis for consideration, regardless of whether services, such as meals, telephone or linen services are provided.

2. The Taxpayer has not collected any amount of New York City Hotel Room Occupancy Tax ("HROT") with respect to any occupancy of rooms or apartments during any period ending on or before August 31, 2003 that the Taxpayer has not paid over to the Department as required by law.

3. The Taxpayer is in compliance with all current obligations to collect and pay over to the Department HROT with respect to all taxable occupancies of rooms and/or apartments as provided in the applicable rules for taxable periods beginning on and after March 1, 2005.

TAXPAYER

By: \_\_\_\_\_ Date: \_\_\_\_\_

Print Name: \_\_\_\_\_