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Diana Beinart
General Counsel/Deputy Commissioner

May 17, 2018

RE: Request for Ruling
Commercial Rent or Occupancy Tax
FLR-18-4988

Dear Mr.

This is in response to your re-submitted request dated January 17, 2018 requesting a ruling as to whether a taxpayer operating a karaoke business may deduct amounts received from customers for the rental of private individual karaoke rooms from their base rent for purposes of the New York City Commercial Rent or Occupancy Tax (hereinafter referred to as the "CRT").

FACTS

The facts presented are as follows:

The taxpayer operates a karaoke business within leased premises below 96th Street in Manhattan. The premises have been sub-divided into individual karaoke rooms equipped with small tables, sofas, a video display and a karaoke machine. The rooms are available to customers for rental by the hour.

ISSUES

1. Do the individual karaoke rooms constitute taxable premises as defined under the CRT statute?
2. If the individual karaoke rooms are not taxable premises, do the amounts received qualify for any of the non-taxable premises reductions to base rent under section 11-701(7) of New York City Administrative Code (hereinafter referred to as the "Ad. Code")?

CONCLUSION

We have determined, under the facts and circumstances presented, that the taxpayer may not reduce its base rent by the amounts received from customers for the hourly rental of the individual karaoke rooms within the leased premises.

DISCUSSION

Under the Ad. Code the CRT is imposed on tenants who occupy or use a property in Manhattan south of 96th Street for the use of trade, business, profession or commercial activity and pay annual or annualized gross rent of at least $250,000.00 while not meeting any of the exception criteria found under the statute. Such tenants will be subject to a tax rate of 6% of their base rent. The taxpayer rents premises below 96th street for the operation of a karaoke business and does not contest that they are subject to the CRT on their base rent.

Base rent is defined as the rent paid for each taxable premises by a tenant to his or her landlord for a period reduced by the amounts received by or due such tenant for the same period from any subtenant of any part of such premises as described under subsections (i)-(v).[1] The Ad. Code allows a deduction from base rent in the amount received as rent from a subtenant for such premises which constitute taxable premises except where such subtenant is exempt from tax under section 11-704(c)(5).[2] Taxable premises are those premises in the city occupied, used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity.[3]

The individual karaoke rooms would not constitute taxable premises as the customers are not using the rooms for the purposes of carrying on or exercising any trade, business, profession, vocation or commercial activity but instead renting the rooms for recreation and leisure. Even when customers use individual karaoke rooms for the occasional entertainment of business associates, clients or employees, the essential purpose is social activity and the premises are not taxable.[4]

In certain cases a tenant may deduct from base rent amounts received by or due for the same period from any subtenant of any part of the premises where such part of the premises do not constitute taxable premises.[5] There is an authorized deduction from base rent for amounts received, "as rent for premises which do not constitute taxable premises, pursuant to a common law relationship of landlord tenant… *except* where it is received as rent, whether or not such landlord-tenant relationship exists, for premises which are occupied as or constitute:…(d) an occupancy of a type which customarily has not been the subject of such a common law relationship of landlord and tenant." [6]

Pursuant to the Ad. Code provisions discussed above, it is our opinion that the hourly rental of a karaoke room, while a non-taxable premise, is not the type of occupancy which has customarily been subject to the common law relationship of landlord and tenant. Therefore, it is specifically barred

[1] NYC Ad. Code 11-701(7).
[2] NYC Ad. Code 11-701(7)(i).
[3] NYC Ad. Code 11-701(5).
[4] See Peat Marwick Main & Co. v New York City Department of Finance et al., 76 NY2d 527, 531-532 (1990).
[5] NYC Ad. Code 11-701(7)(ii), (iv), and (v).
[6] NYC Ad. Code 11-701(7)(v) (emphasis added).

from the deduction from base rent set out in Ad. Code section 11-701(7)(v) as one of the four exclusions listed under such subsection. The transfer of absolute control and possession differentiates a lease from an arrangement dealing with property rights that does not form a landlord and tenant relationship.[7] Where one party's interest in another's property exists for a fixed term, not revocable at will and terminable only on notice, a landlord-tenant relationship has been created.[8] However, in renting the individual karaoke rooms to customers for use by the hour the taxpayer, creates an arrangement that is revocable at will and does not require notice to terminate, and does not transfer absolute control and possession of the room to the customer. Therefore the arrangement between the customers and the taxpayer for the hourly rental of the karaoke rooms is not the type of occupancy that would commonly be subject to a landlord-tenant relationship.

The other deductions from base rent for premises that are not taxable premises set out under Ad. Code section 11-701(7)(ii) and (iv), premises used as lodging by the subtenant and those deductible by reason of section 11-704(c)(5) respectively, are not raised by the taxpayer in their submission and nothing in the submission indicates that these subsections would be applicable to the present facts submitted. Therefore, the taxpayer does not meet the criteria of any of the deductions from base rent found under the CRT statute for the rental of the individual karaoke rooms.

Sincerely,

Diana Beinart
General Counsel

[7] Feder v. Caliguira, 8 NY2d 400, 404 (1960).
[8] American Jewish Theatre v Roundabout Theatre Co., 203 AD2d 155, 156 (1st Dept. 1994).