

For an additional cost, the Company offers other services to office suite occupants, including conference room usage, unlimited coffee, telephone services with unlimited calls in the United States and wired and wireless internet service, as well as use of copying machines located in the common reception areas. In addition, also for an additional cost, the Company offers its office occupants the opportunity to utilize other services such as voicemail to email and cable television. All of the services offered by the Company are only available to occupants of its office suites. They are not available to the general public

In response to our request, you also submitted a draft of the license agreement (the "Agreement") used by the Company with respect to the office suites. It is entitled "Terms of Service." The Agreement provides that the Company will use its good faith efforts to provide certain amenities such as heating, air conditioning, lighting, electricity, cleaning and janitorial services and access to common areas such as kitchens, sanitary facilities, photocopying areas and facsimile areas to the occupant (provided that use of the equipment therein may be subject to additional charges). The occupant agrees not to compete with the Company's business of providing "serviced accommodations." The occupant is prohibited from installing any furniture, office equipment, satellite or microwave antennas or dishes, cabling, technology or telecommunications lines or connections, computer networking equipment (including wired or wireless routers), space heaters, coffee machines, water coolers or refrigerators without the Company's prior written consent, which the Company may refuse at its sole absolute discretion. The Company will use "commercially reasonable efforts" to provide the occupant with access to and use of the hardware, consulting and other services set forth on an order form, a blank copy of which was submitted with the Agreement. There are also "Incremental Services" that the Company will make available on a "fee-for use basis." The occupant agrees to provide the Company with all support and cooperation that is reasonably requested from time to time in connection with the provision of the services. Such cooperation will include but not be limited to monitoring use of and access to the services, and investigating and taking action with respect to suspected or known violations of the rules and regulations. The occupant agrees to pay monthly fees for the license and for the services set forth in the order form and the addenda as well as fees for any Incremental Services used by the occupant.

ISSUE PRESENTED:

You have requested a ruling that the Company is not engaged in an unincorporated business for purposes of the UBT.

CONCLUSION:

The Company is engaged in the business of providing “serviced accommodations.” The services provided in conjunction with the licensing of the office space go beyond the incidental services contemplated by the statute in section 11-502(d) of the Administrative Code of the City of New York (the “Code”) and are a primary focus of the Agreement. Consequently, the Company is not exempt from the UBT by reason of holding, leasing or managing real property.

DISCUSSION:

Code section 11-503(a) imposes the UBT “on the unincorporated business taxable income of every unincorporated business wholly or partly carried on within the city.” Code section 11-502(a) defines an unincorporated business as any trade, business, profession, or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity. Code section 11-502(d) provides that “[a]n owner or real property, a lessee or a fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing, or managing real property.” Code section 11-502(d) further provides that “the conduct by such owner, lessee or fiduciary, at such real property, of a trade, business, profession or occupation, including but not limited to, a garage, restaurant, laundry or health club, shall be deemed to be an incident to the holding, leasing or managing of such real property, and shall not be deemed the conduct of an unincorporated business, if such trade, business, profession or occupation is conducted solely for the benefit of tenants at such real property, as an incidental service to such tenants, and is not open or available to the general public...”

The Company rents office space in various buildings which it then converts into office suites. The Company then licenses the use of those suites to third parties. To determine the true intent of the arrangement between the Company and the office occupants, the Agreement should be viewed in its entirety and with an eye towards its practical result. Although some of the services that the Company provides could qualify as “incidental” within the meaning of the statute, many of the services offered by the Company for purchase go far beyond the incidental services contemplated by the statute. Thus, while the Company offers services without any additional cost which any lessee or

licensee of property would provide, such as heat and light, the focus of the Agreement is the provision of the office services by the Company. Indeed, the Company identifies itself as in the business of providing “serviced accommodations,” and the Agreement between the Company and the occupant is entitled “Terms of Service.” The company is marketing a bundle of office services, which includes the office space as one service among many. In addition to the space itself, the Company markets an array of office services, not generally incidental to the leasing or managing real property, but necessary to the functioning of an office. They include basic receptionist services, concierge services, basic IT assistance, and cleaning and maintenance services at no additional cost, and conference room usage, coffee, telephone service, internet service, copying machines, voicemail to email and cable television for which a supplemental fee must be paid. Furthermore, the Company reserves for itself the right to provide such services as the Agreement prohibits the occupant from installing any furniture, office equipment, satellite or microwave antennas or dishes, cabling, technology or telecommunications lines or connections, computer networking equipment, space heaters, coffee machines, water coolers or refrigerators without the Company’s prior written consent. Finally, the inclusion of a non-competition clause in the Agreement provides additional proof that the arrangement is not a license for use of property falling under Code section 11-502(d) but rather an agreement to provide services. Accordingly, the exemption set forth in Code section 11-502(d) does not apply in this instance, and the Company is subject to the UBT.

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This opinion is based on the facts presented. The Department of Finance reserves the right to modify its opinion in the event that the facts upon which this opinion is based are other than as described above.

Very truly yours,

Beth Goldman
General Counsel