

New York City Tax Appeals Tribunal

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In the Matter of :
:
AMERICAN AIRLINES, INC. : DECISION
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Petitioner. : TAT (E) 05-29 (HO)
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The Commissioner of Finance of the City of New York (“Respondent”) filed an Exception to a Determination of the Deputy Chief Administrative Law Judge (the “DCALJ”) dated May 29, 2008 (the “DCALJ Determination”). The DCALJ Determination dismissed a Notice of Disallowance issued by the New York City Department of Finance (the “Department”) and granted Petitioner’s requested refund of New York City Hotel Room Occupancy Tax (“HROT”) paid for the period July 1, 2002, through June 30, 2003 (the “Tax Period”). Petitioner filed a Cross-Exception to the DCALJ Determination.

Petitioner appeared by William Ault, Esq., and Jay Rosen, Esq., of Deloitte Tax LLP. Respondent appeared by Martin Nussbaum, Esq., Assistant Corporation Counsel, New York City Law Department. The parties filed briefs and oral argument was held before this Tribunal. Commissioner Robert J. Firestone did not participate in this decision.

Petitioner is a commercial airline that operates regularly scheduled commercial flights into and out of airports in and around New York City (the “City”).¹ When Petitioner’s pilots

¹ The DCALJ’s Findings of Fact, although paraphrased and amplified herein, generally are adopted for purposes of this Decision. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the DCALJ Determination. We have not adopted any of the additional findings of fact requested by the parties.

and flight attendants had layovers between flights to and from airports in the City, Petitioner arranged and paid for their hotel accommodations in the City.

Petitioner entered into written letters of agreement with several hotels to provide accommodations for Petitioner's pilots and flight attendants during the Tax Period.

Petitioner and Park Central Hotel ("Park Central"), located at 870 Seventh Avenue in Manhattan, entered into a letter of agreement for the period July 1, 2002, through July 30, 2003 (the "Park Central Agreement"). The Park Central Agreement required Park Central to provide single room hotel accommodations for Petitioner's pilots and flight attendants at a fixed daily rate plus tax and a bellman gratuity charge.

The Park Central Agreement required Park Central to reserve rooms nightly based on Petitioner's "current requirements" with the understanding that the number of rooms might vary from month to month. Petitioner agreed to notify Park Central of its updated "requirements on a monthly basis, approximately 10 days prior to the first day of each month." Park Central agreed to provide additional rooms "as needed, on a daily basis at the same rate, subject to availability." T. Ex. 12B.

The Park Central Agreement provided that individual room cancellations would be honored upon notification and that, in the case of a "double overnight" Petitioner would not be billed for the second night in the event of a no-show.²

² The term "double overnight" is not defined but it appears to refer to a two night reservation. Petitioner's witness, Connie Stilwell, testified that if an individual was "scheduled to stay for a two-night period and they did not show up for the first night . . . [Petitioner] would not be charged for the second night as well." Tr. 83.

Under the Park Central Agreement, either Petitioner or Park Central could terminate the agreement without cause on sixty days' written notice. Petitioner and Park Central also could terminate the agreement for cause under certain circumstances with varying periods of notice.

During the Tax Period, Petitioner used Park Central for crew members of flights leaving City airports who had layovers of more than fourteen hours.

Petitioner and Radisson Hotel JFK Airport ("Radisson"), located at 135-30 140th Street, Jamaica, New York, entered into a letter of agreement covering the period September 30, 2001, through September 29, 2003 (the "Radisson Agreement"). Under the Radisson Agreement, Radisson agreed to provide single room accommodations for Petitioner's flight crew members at a fixed daily rate plus tax.

The Radisson Agreement required Radisson to reserve rooms nightly based on Petitioner's "current requirements" with the understanding that the number of rooms might vary from month to month. Petitioner agreed to notify Radisson of its updated "requirements on a monthly basis, approximately 10 days prior to the first day of each month." Radisson agreed to provide additional rooms "as needed, on a daily basis at the same rate, subject to availability." T. Ex. 13B.

The Radisson Agreement provided that individual room cancellations would be honored upon notification and that, in the case of a "double-overnight," Petitioner would not be billed for the second night in the event of a no-show.

Petitioner could terminate the Radisson Agreement for cause under various circumstances but neither Petitioner nor Radisson could terminate the Radisson Agreement

without cause.

During the Tax Period, Petitioner used Radisson for crew members of flights leaving JFK International Airport who had layovers of less than fourteen hours.

Petitioner and Courtyard By Marriott at LaGuardia (“Marriott”), located at 90-10 Grand Central Parkway, East Elmhurst, New York, entered into two letters of agreement dated October 5, 2001, and October 16, 2002, covering the periods October 1, 2001, through December 31, 2002, and January 1, 2003, through December 31, 2004, respectively (the “Marriott Agreements”). Under the Marriott Agreements, Marriott agreed to provide hotel accommodations for Petitioner’s flight crew members at a fixed daily rate plus tax and a charge for baggage handling.

Marriott agreed to reserve rooms nightly based on Petitioner’s “current requirements” up to a maximum of fifty-five rooms per night with the understanding that the number of rooms might vary from month to month. Under the Marriott Agreement for the period ending December 31, 2002, Marriott agreed to provide additional rooms at its discretion. The Marriott Agreement for the subsequent period did not contain any provision for additional rooms.

The Marriott Agreements provided that individual room cancellations would be honored upon notification and that, in the case of a “double-overnight,” Petitioner would not be billed for the second night in the event of a no-show.

Under the Marriott Agreements, if the rooms reserved were not available, Marriott could substitute other rooms in Marriott or in other “partnership hotels.” Under the Marriott Agreement dated October 5, 2001, Petitioner agreed to accept any such substitution without

prior notice but under the Marriott Agreement dated October 12, 2002, Petitioner agreed to accept any such substitution only with prior notice.

The Marriott Agreements provided that either party could cancel for cause under various circumstances. The Marriott Agreement for the period ending December 31, 2002, also provided that Marriott could cancel the agreement without cause on thirty days' written notice.

During the Tax Period, Petitioner used Marriott for crew members of flights leaving LaGuardia Airport who had layovers of less than fourteen hours.

Every month, Petitioner submitted separate requirements reports to Park Central, Radisson and Marriott (the "Hotels") stating how many rooms it would need each night during the following calendar month. The rooms needed varied not only from month to month but also from night to night. Petitioner also made requests for additional rooms as needed.

Connie Stilwell, the manager of Petitioner's "flight financial and planning department," testified for Petitioner. She testified that her responsibilities included supervising the group that audited the hotel bills for crew members' accommodations. She further testified that Petitioner paid for the rooms it had requested and reserved whether or not they were used by a crew member as long as the number of rooms billed to Petitioner was generally consistent with the room requests. When asked why Petitioner would pay for an unused room, Ms. Stilwell explained that, generally, Petitioner would not know if the room went unused. She further testified that her group did not have any auditing process for unused rooms, including additional rooms requested on a daily basis. Finally, Ms. Stilwell testified that the sign-in sheets provided by Petitioner to the Hotels were not used in auditing

the billing by the Hotels and that at her group's own request, it did not receive the sign-in sheets from the Hotels.

Monica Chamberlain, Petitioner's Manager of Hotel Contracts during the Tax Period, also testified for Petitioner. Ms. Chamberlain and the staff she supervised were responsible for hotel accommodations and ground transportation for Petitioner's flight crews during layovers. Ms. Chamberlain managed the process for engaging hotels to provide rooms for Petitioner's flight crews. Each year, Ms. Chamberlain and her staff negotiated or renegotiated 100 or more agreements with hotels worldwide to provide rooms for flight crews.

Ms. Chamberlain testified both as a witness to the facts of Petitioner's agreements and dealings with the Hotels, and as an expert witness on industry practices in the hotel/airline accommodation industry.³

Ms. Chamberlain testified that it was standard practice for airlines to enter into agreements with hotels for crew accommodations and that Petitioner's method of contracting for crew hotel accommodations was similar to the method used by other airlines. Ms. Chamberlain testified that at the time of contracting it is impossible to know how many rooms the airline will need each night during the period of the contract. During negotiations, Petitioner provided each Hotel with information regarding Petitioner's use of Hotel rooms during the prior twelve to twenty-four months.

Petitioner used at least one room in each of the Hotels every day for a period beginning at least 180 days prior to the start of the Tax Period and continuing throughout the

³ Respondent's motion to preclude Ms. Chamberlain from testifying as an expert was dismissed at the hearing. Respondent did not take exception to the DCALJ's dismissal of the motion.

Tax Period.

Petitioner filed a written request dated August 13, 2003, for a refund of HROT for the Tax Period in the amount of \$221,359.65 (consisting of \$77,358.87 for the \$2.00 per room portion of the HROT and \$144,000.78 for the five percent portion of the HROT.) Petitioner submitted documentary evidence and testimony supporting the amount of the HROT refund requested by Petitioner, which did not include the amounts for which the Hotels previously gave Petitioner a credit during the Tax Period.⁴ Respondent did not challenge the accuracy of Petitioner's computation of the amount of the HROT refund request.

Respondent issued a Notice of Disallowance dated October 31, 2003, denying Petitioner's refund request (the "Notice").

The DCALJ dismissed the Notice and granted Petitioner's refund request. The DCALJ concluded that the statutory provision that no HROT be imposed on "a permanent resident" is an exemption, not an exclusion, and must be construed narrowly. Nevertheless, the DCALJ concluded that once a person qualifies as a permanent resident by occupying one or more rooms in a hotel for at least 180 consecutive days, the exemption applies to every occupancy in that hotel from the beginning of the 180 day period and continuing for as long as that person qualifies as a permanent resident. Based on that conclusion, the DCALJ further concluded that the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of §12-01 "Permanent Resident," of the Rules of the City of New York Department of Finance relating to the HROT (19 RCNY Chapter 12) (the "HROT Rules"), conflict with the applicable statute.

⁴ See *infra* note 8.

Respondent takes exception to the DCALJ's conclusion that the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 "Permanent Resident" conflict with the applicable statute and the DCALJ's conclusion that because Petitioner was a permanent resident of each Hotel during the Tax Period, the exemption applied to every occupancy by Petitioner in the Hotels during the Tax Period.

Petitioner takes exception to the DCALJ's rejection of its alternative argument. Petitioner argued in the alternative that even if the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 "Permanent Resident" are valid, those provisions do not apply to Petitioner because Petitioner's letters of agreement with the Hotels covering the Tax Periods (the "Agreements") are enforceable requirements contracts having a term of more than 180 consecutive days and, therefore, Petitioner should be exempt as a permanent resident of each room reserved and paid for under the Agreements. In rejecting Petitioner's alternative argument, the DCALJ concluded that:

[t]he Agreements that give Petitioner the right to reserve varying numbers of rooms each month based on its history of hotel room occupancy at a set price per room are insufficient alone to qualify Petitioner as a [p]ermanent [r]esident.⁵

Petitioner also takes exception to the DCALJ's conclusion that the statutory provision governing permanent residents is an exemption and not an exclusion.

For the following reasons, we reverse the DCALJ Determination to the extent of the DCALJ's conclusions that the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 "Permanent Resident" conflict with the applicable statute and that, because Petitioner was a permanent resident of the Hotels during the Tax

⁵ DCALJ Determination at 16-17.

Period, Petitioner was exempt from the HROT with respect to every occupancy in the Hotels during the Tax Period. We affirm the DCALJ Determination to the extent of the DCALJ's rejection of Petitioner's alternative argument and his conclusion that the provision regarding permanent residents is an exemption and not an exclusion. As a result, we deny Petitioner's HROT refund request and sustain the Notice.

Section 11-2502.a of the Administrative Code of the City of New York (the "Code") imposes the HROT on "every occupancy of each room in a hotel" in the City. Paragraph (1) of subdivision b of Code §11-2502 states: "[n]o tax shall be imposed hereunder upon a permanent resident." Subdivision 8 of Code §11-2501 provides that "[a]ny occupant of any room or rooms in a hotel for at least one hundred eighty consecutive days shall be considered a permanent resident with regard to the period of such occupancy."

Principles of statutory construction call for taxing statutes generally to be construed against the government and in favor of taxpayers where there is "doubt as to the construction" of the statute. McKinney's Statutes §313.c. This:

principle is, however, applicable only in determining whether property, income, a transaction or event is subject to taxation. . . . An exemption from taxation "must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption". Indeed, if a statute or regulation authorizing an exemption is found, it will be "construed against the taxpayer" This is because an exemption is not a matter of right, but is allowed only as a matter of legislative grace.⁶

McKinney's Statutes §294 states "[t]ax exemption statutes are in derogation of the sovereign authority of the state, and the courts do not favor them." (Footnotes omitted.) Petitioner

⁶ Matter of Grace, 37 N.Y.2d 193, 196 (1975) (citations omitted).

argues that subdivision b of Code §11-2502 is an exclusion that should be construed against the government rather than an exemption.

Subdivision c of Code §11-2502 provides that “[n]o tax shall be imposed hereunder” on various governmental entities or on certain nonprofit organizations. Subdivision j of Code §11-2502 refers to subdivision c of that section as an “exemption.” Because both subdivisions b and c provide that “[n]o tax shall be imposed hereunder” on permanent residents and government and nonprofit entities, respectively, there is no basis for characterizing subdivision b as an exclusion and subdivision c as an exemption.

Subdivision j of Code §11-2502 provides:

[I]t shall be presumed that all rents are subject to tax until the contrary is established, and the burden of proving that a rent for occupancy is not taxable hereunder shall be upon the operator or the occupant.

As the statute presumes all rents to be taxable, we conclude that subdivision b more closely resembles an exemption than an exclusion and, consequently, should be construed narrowly against Petitioner. Moreover, the legislative history of the permanent resident exemptions in the HROT and the closely related New York State and City sales taxes discussed below, refers to the provisions governing permanent residents as exemptions. *See infra* text accompanying notes 18 and 22.

Having concluded that Code §11-2502.b is an exemption to be construed narrowly, we must determine whether Petitioner is eligible for the exemption. The last sentence of subdivision (2) of HROT Rule §12-01 “Permanent Resident” elaborates on the definition of a permanent resident:

Where a permanent resident rents additional rooms on a temporary basis, 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.

Subdivision (3) of HROT Rule §12-01 “Permanent Resident” contains seven illustrations including the following:

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 airline’s occupancy of the additional rooms.

Illustration (iii): B, an individual, resides in a hotel where 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. 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 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 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 for the occupancy of the 75 additional rooms.

Although only Illustration (ii) discusses an airline in particular, each of these illustrations reflects the general statement in the last sentence of subdivision (2) of HROT Rule §12-01 “Permanent Resident” that the exemption does not apply to additional rooms rented by a permanent resident on a temporary basis until they have been occupied for at least 180 consecutive days.⁷ Under the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 “Permanent Resident,” Petitioner would be exempt from HROT only on those rooms occupied by it for at least 180 consecutive days.⁸ Petitioner argues that those provisions of the HROT Rules are not supported by the statutory language of Code §11-2502.b and, therefore, are invalid.

Respondent argues that the Department’s regulatory interpretation of the permanent resident exemption in the HROT Rules must be upheld unless Petitioner can prove that its interpretation is the only possible interpretation of the statute citing Matter of Blue Spruce Farms, Inc., 99 A.D.2d 867 (3d Dept. 1984), *aff’d*, 64 N.Y.2d 682 (1984). In that case, the New York State Supreme Court, Appellate Division, Third Department, stated:

⁷ The briefs filed by Petitioner and Respondent and the DCALJ Determination do not address Illustrations (iii) through (vi).

⁸ Invoices from the Hotels included in the Record indicate that Petitioner received refunds of HROT for the rooms that it occupied for at least 180 consecutive days in the form of credits. T. Ex. 1, 2 & 3. Respondent does not dispute Petitioner’s entitlement to those credits and the “Explanation of Calculations” in Taxpayer’s Exhibits 1, 2 and 3 state that Petitioner’s refund request does not include those amounts. *See also* T. Ex. 9, 10 & 11.

To prevail over the administrative construction, [taxpayer] must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction. Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute or erroneous, it should be upheld.⁹

Petitioner argues that the relevant standard to be applied in this case is not the one articulated in Matter of Blue Spruce Farms, Inc., *supra*, but the standard adopted by the New York State Court of Appeals (the "Court of Appeals") in Kurcsics v. Merchants Mutual Insurance Company, 49 N.Y.2d 451 (1980) ("Kurcsics"). In that case, the Court of Appeals held:

Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the government agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.¹⁰

The Court of Appeals has applied the Kurcsics standard in subsequent tax cases, including cases involving regulations interpreting exemptions, where the court found the issue to be solely a matter of statutory interpretation not requiring the technical expertise of the taxing

⁹ Matter of Blue Spruce Farms, 99 A.D.2d 867, 867 (citations omitted).

¹⁰ Kurcsics, 49 N.Y.2d 451, 459 (citations omitted).

authority. *See* Matter of Debevoise & Plimpton, 80 N.Y.2d 657 (1993); Matter of Moran Towing and Transportation Co., Inc., 72 N.Y.2d 166 (1988). The New York State Tax Appeals Tribunal similarly has not deferred to regulations of the New York State Department of Taxation and Finance when it found the issue to be one of “pure statutory construction” and the regulation in question to be “out of harmony with the statute.” Matter of Langlan, New York State Tax Appeals Tribunal (September 4, 1997); *see also* Matter of Shorter, New York State Tax Appeals Tribunal (July 31, 1997).

While this case involves a question “of pure statutory reading and analysis,” Kurcsics, 49 N.Y.2d 451, 459, that fact alone is not a sufficient basis for invalidating the portions of the HROT Rules at issue. Under the Kurcsics standard, a court should give little deference to an administrative regulation only when an “accurate apprehension of legislative intent” can be made. And a court should completely ignore an administrative regulation only if the regulation “runs counter to the clear wording” of the statute. Thus, we first must attempt to discover the legislative intent behind the permanent resident exemption.

In a recent decision, the New York State Supreme Court, Appellate Division, First Department, held that “the clearest indicator of legislative intent is the statutory text” Roberts v. Tishman Speyer Properties, L.P., 2009 N.Y. Slip Op. 01595 at 8, 874 N.Y.S.2d 97, 105 (1st Dept. 2009) (quoting Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 583 (1998)).

Subdivision b of Code §11-2502 provides that no HROT will “be imposed . . . upon a permanent resident” with no further qualification. Petitioner argues that under the clear wording of that subdivision, if a person qualifies as a permanent resident, the HROT does not apply to any rent paid by that permanent resident for occupancy of any room in the same hotel as long as that person continues to qualify as a permanent resident. Therefore,

Petitioner asserts, the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 “Permanent Resident” are inconsistent with the clear wording of the statute and are thus invalid.¹¹

Respondent argues that subdivision b of Code §11-2502 must be read together with the definition of a permanent resident in Code §11-2501, under which a person meeting the occupancy requirement qualifies as a permanent resident during the “period of such occupancy,” “such occupancy” being the occupancy of any room or rooms for 180 consecutive days or more. Respondent argues that the definition limits the exemption to occupancies by a permanent resident lasting at least 180 consecutive days. Respondent argues that if the exemption were intended to apply as broadly as Petitioner claims, the reference in the definition to “any room or rooms” (emphasis added) would be unnecessary. Respondent argues that the added reference to “or rooms” is necessary to allow a permanent resident to be exempt from HROT for simultaneous occupancies of multiple rooms for at least 180 consecutive days. Without that additional reference, a permanent resident could only be exempt from HROT on the occupancy of a single room for 180 consecutive days or more. Respondent’s Brief in Support of Exception at 3.

Each party argues that had the New York State Legislature (the “State Legislature”) intended the interpretation asserted by the other party, the State Legislature would have worded the statute differently and that the interpretation favored by the other party requires ignoring words or phrases in the statute.

Subdivision b of Code §11-2502 provides that the HROT does not apply to a permanent resident. As pointed out by Respondent, nothing in subdivision b limits the

¹¹ Although neither party nor the DCALJ addressed Illustrations (iii) through (vi) of subdivision (3), those illustrations also appear inconsistent with Petitioner’s reading of subdivision b of Code §11-2502.

exemption to the hotel in which the permanent resident occupies a room for at least 180 consecutive days. Respondent’s Brief in Support of Exception at 21. Extending Petitioner’s argument to its logical conclusion, as long as a person occupies a single room in a single hotel for at least 180 consecutive days, that person would qualify as a permanent resident and be exempt from HROT on every other room rented by that person in any hotel in the City. Nothing in the statutory language or in the legislative history of the HROT indicates that the State Legislature intended the exemption to extend that far. And at oral argument, Petitioner’s representative conceded that it would have been reasonable for Respondent to adopt rules limiting the exemption on a hotel-by-hotel basis.

Not only does subdivision b of Code §11-2502 not limit the exemption to rooms occupied in the same hotel, but the definition of permanent resident also does not require the 180 days of consecutive occupancy to be in a hotel in the City. As a result, the literal language of the relevant statutory provisions would theoretically allow a person who occupies a room in a hotel in Westchester County, or even Las Vegas, for 180 consecutive days to qualify as a permanent resident and claim exemption from the HROT on every hotel room occupied in the City during that period.

Statutes should be interpreted to avoid “an unreasonable or absurd result.” People v. Santi, 3 N.Y.3d 234, 242 (2004) (quoting Williams v. Williams, 23 N.Y.2d 592, 599 (1969)); Long v. New York, 7 N.Y.3d 269, 273 (2006); *see also* Roberts v. Tishman Speyer Properties, L.P., 2009 NY Slip Op. 01595 at 8, 874 N.Y.S.2d 97, 105 (1st Dept. 2009); McKinney’s Statutes §145. “Read in vacuum-like isolation with absolute literalness,”¹² the definition of permanent resident in Code §11-2501.8 coupled with the broad language of the exemption in Code §11-2502.b clearly would produce an absurd result. The Court of

¹² Long v. Adirondack Park Agency, 76 N.Y.2d 416, 420 (1990).

Appeals has stated that where a literal reading of a statute would lead to an absurd result that would frustrate a statutory purpose, a court should:

approach the statute's provisions sequentially and give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions.¹³

Aside from parsing the literal words of the statute, Petitioner has offered no evidence of the State Legislature's intent in enacting the permanent resident exemption. Because it is unreasonable to assume the State Legislature intended the statute to apply as broadly as the literal language would allow, it is not possible to apprehend from the statutory language alone what limitations the State Legislature intended. Therefore, we must turn to the extensive legislative history of that exemption for evidence of the statutory purpose behind the permanent resident exemption.

The City was first authorized to tax hotel room occupancies in 1946. The enabling legislation, Chapter 341 of the Laws of New York of 1946, provided that:

no tax shall be imposed on the occupancy of any . . . room or rooms by any permanent resident. . . . The term "permanent resident" shall mean any person who occupies, or who has or shall have had the right to occupancy of any room or rooms in a hotel . . . for at least ninety consecutive days during the current calendar year or preceding year.¹⁴

¹³ *Id.*; see also Ryder v. City of New York, 32 A.D.3d 836, 837 (2d Dept. 2006).

¹⁴ Laws of New York 1946, ch. 341.

The City Council enacted the tax as Title V of Chapter 41 of the Code through Local Law 15 of 1946 (the “Old HROT”). Although subsequently renumbered as Chapter 46, the Old HROT was in effect until July 31, 1965.

On March 8, 1962, regulations limiting the permanent resident exemption to those hotel rooms occupied for at least 90 consecutive days first appeared when the City Comptroller¹⁵ added the language that now appears, essentially unchanged,¹⁶ as the last sentence of subdivision (2) and as Illustrations (ii) through (vi) of subdivision (3) of HROT Rule §12-01 “Permanent Resident” to the City’s regulations under the Old HROT. Comptroller’s Regulations Pertaining to the Tax On Occupancy of Hotel Rooms Law, Article 11.

Three years later, the State Legislature repealed the City’s authority to impose the Old HROT as part of legislation enacting the New York State Sales Tax (the “State Sales Tax”), which included a tax on the occupancy of hotel rooms. Laws of New York 1965, ch. 93. That legislation authorized the City to enact a comparable citywide sales tax, including a tax on hotel room occupancy. Tax Law §1210. The legislative history makes it clear that the 1965 legislation was intended to consolidate the separate local taxes on sales, including hotel room occupancy, into a single taxing system that would be administered by New York State (the “State”) with greater efficiency.¹⁷

¹⁵ At that time, the Comptroller was charged with administering the City’s taxes.

¹⁶ The language adopted in 1962 differs from the current HROT Rules only in numbering, in referring to the 90-day period of consecutive occupancy required at that time to qualify as a permanent resident, and in using “he” instead of “that person” in various places.

¹⁷ The Memorandum of the Rules Committee on chapter 93 said:

The proposed State base would also include some sales and charges now taxed as part of the New York City sales tax and taxed upstate under separate taxing authority. This category includes . . . hotel and motel occupancy. . . . The bill would repeal chapter 873 of the Laws of 1934,

The State Sales Tax and the comparable City sales tax (collectively the “Sales Taxes”) include an exemption from the Sales Taxes on hotel room occupancy for permanent residents very similar to that in the HROT. Tax Law §1105(e) provides that “the tax shall not be imposed upon . . . a permanent resident. . . .” Tax Law §1101(c)(5) as originally enacted defined a permanent resident as “[a]ny occupant who has or shall have had the right to occupancy of any room or rooms in a hotel for at least ninety consecutive days.” Section 3 of chapter 575 of the Laws of New York of 1965 made technical corrections to the State Sales Tax including amending the definition of permanent resident to read: “[a]ny occupant of any room or rooms in a hotel for at least ninety consecutive days shall be considered a permanent resident with regard to the period of such occupancy.” Laws of New York 1965, ch. 575, §3. The Rules Committee report on that amendment explained:

This change would seem to make it clearer that the exemption for a permanent resident applies only to the period or periods when such person is a permanent resident. . . . The original wording might be misconstrued to mean that if an individual was ever a permanent resident, he retains that status for all subsequent occupancies.¹⁸

chapter 341 of the Laws of 1946 and chapter 278 of the Laws of 1947, three legislative acts which constitute most of the basic enabling legislation for New York City . . . to impose specified nonproperty taxes. . . . Statewide administration of local taxes on . . . hotel occupancy . . . should stem avoidance and evasion of existing levies, provide a more efficient mechanism for collection, and simplify compliance by vendors. [Emphasis added.]

New York State Legislative Annual (1965) at 432-35.

¹⁸ Laws of New York 1965, ch. 575, Bill Jacket at 13. This language supports our conclusion that the provision is an exemption and not an exclusion.

In a letter to the Governor dated June 28, 1965, in support of the bill, the then State Commissioner of Taxation and Finance wrote: “The definition of permanent resident . . . is amended to stress actual occupancy rather than merely the right to occupancy.”¹⁹

In 1965, shortly after the Sales Taxes were enacted, the State Department of Taxation and Finance issued Booklet No. 2, ST-210, “New York State and Local Sales Tax Information - Questions and Answers for Consumers,” which contained the following question and answer:

Q. Is there a tax on hotel or motel rooms occupied as a permanent residence?

A. No. If the hotel or motel rooms are occupied for at least 90 consecutive days, there is no tax.

Thus, by 1965, both the City and the State had taken the position that the permanent resident exemption applied only to those rooms occupied for at least 90 consecutive days.

The State adopted regulations, effective September 1, 1976, governing the State Sales Tax on hotel room occupancies. Paragraph (8) of subdivision (b) of §527.9 of those regulations contained the following example:

Example 1: A corporation contracts with a hotel operator for five rooms at the rate of \$10 a night on a continuing basis for use by its employees and uses additional rooms as the need arises. The operator is required to collect tax on the occupancy charge to the corporation. When 90 consecutive days of occupancy have passed, the corporation will be classified as a permanent resident, with respect to the five rooms occupied continuously for

¹⁹ Laws of New York 1965, ch. 575, Bill Jacket at 10.

90 days and is entitled to a refund of the tax paid on the charge for these occupancies. As regards to the additional rooms the corporation occupies, it is a nonpermanent occupant and is not eligible for a sales tax refund.

With some modifications not relevant to the issue before us,²⁰ this example is still in effect and does not differ substantively from Illustration (ii) of subdivision (3) of HROT Rule §12-01 “Permanent Resident” as now in effect and as it was originally adopted in 1962.

In 1970, as part of a revenue enhancement package for the City, the State Legislature authorized the City to enact a separate tax on hotel room occupancies in addition to the City sales tax on hotel room occupancies. Laws of New York 1970, ch.161. Section 1 of Chapter 162 of the Laws of New York of 1970 added the following language to that enabling law:

[P]rovided, however, such tax shall not be applicable to a permanent resident of a hotel. For the purposes of this section the term “permanent resident” shall mean a person occupying any room or rooms in a hotel for at least ninety consecutive days.²¹

By Local Law 15 of 1970, the City Council enacted Title VV of Chapter 46 of the Code, which was renumbered in 1986 as Title 11, Chapter 25 of the Code, the current HROT provisions. The Report of the City Council Committee on Finance on that local law, Int. No. 282-A, stated: “[e]xempt from this tax would be . . . permanent hotel residents occupying a room for 90 or more consecutive days.”²²

²⁰ The modifications reflect the different periods of occupancy for qualifying as a permanent resident in the State and City.

²¹ Laws of New York 1970, ch. 162, §1.

²² This language further supports our conclusion that the provision is an exemption and not an exclusion. In 1980, the State Legislature amended the permanent resident exemptions in the City sales tax

The definition of permanent resident in paragraph 8 of Code §VV46-1.0 as enacted in 1970 was identical to the definition of that term under the Sales Taxes. Tax Law §§1101(c)(5) and 1210(b). Nothing in the legislative history of the 1970 enabling legislation or the local law implementing the HROT indicates any intent to change the nature of the permanent resident exemption from that contained in the Old HROT or the Sales Taxes or to modify the City's or State's previous regulatory interpretation of the exemption.

In August 1983, the Department adopted regulations under the HROT as enacted in 1970. Subdivision (b) of Article 9 of those regulations contained the language originally adopted in the 1962 regulations and that now appears as the last sentence of subdivision (2) and Illustrations (ii) through (vi) of subdivision (3) of HROT Rule §12-01 "Permanent Resident."

To summarize, since the permanent resident exemption in the Old HROT was originally enacted over sixty years ago, the State Legislature has amended or reenacted relevant provisions of laws taxing hotel room occupancies at least three times. On three occasions, the State and City taxing authorities adopted regulations consistently limiting the permanent resident exemption to occupancies of at least 90 or 180 consecutive days, whichever period applied. The City adopted the first of those regulations almost forty-seven years ago, which included an example of an airline renting hotel rooms for its employees under circumstances comparable to those present in this case. Although Petitioner's witness testified that Petitioner has been flying into the City and using hotels for about forty years (Tr. 180-81), Petitioner offered no evidence that it or any other airline or any other person questioned the validity of those regulations during the intervening years or asked the State

on hotel room occupancies and the HROT to make the applicable period 180 consecutive days instead of 90. Laws of New York 1980, chs. 252, 253. The State Legislature did not make any other changes to the exemption or the definition of permanent resident at that time.

Legislature, the City Council or the Department to change the law or to amend the regulations under the Old HROT, the Sales Taxes or the current HROT, until now. Nor has Petitioner identified any instance in which a taxing authority or court has adopted the interpretation of the permanent resident exemption urged by Petitioner in this case.

The Court of Appeals has recognized that the failure of the State or local legislatures to reverse a long-standing interpretation of a statute is a strong indication that the interpretation is the correct one. *See* La Guardia v. Cavanaugh, 53 N.Y.2d 67, 78 (1981); Engle v. Talarico, 33 N.Y.2d 237, 242 (1973); RKO-Keith-Orpheum Theatres, Inc. v. City of New York, 308 N.Y. 493, 500 (1955); Matter of Will of Schinasi, 277 N.Y. 252, 265-66 (1938); *see also* McKinney’s Statutes §129(a).

In our opinion, the taxing authorities’ long-standing and consistent interpretation of the permanent resident exemption left untouched by the State Legislature despite repeated reenactment and amendment of the relevant statutes should be given substantial deference as reflecting legislative intent. This is especially true where, as here, the State Legislature expressly and repeatedly gave the City and State taxing authorities specific authority to adopt procedures for determining when room rents are taxable and non-taxable.²³ That specific authority strongly suggests that the State Legislature intended the taxing authorities to interpret the permanent resident exemption. Without clear evidence of any contrary intent on the part of the State Legislature, a court should not upset almost a half century of settled expectations as to the operation of the permanent resident exemption under the various State

²³ Code §V41-11.0.5, renumbered as §V46-11.0.5, authorized the City to “prescribe methods for determining the rents for occupancy and to determine the taxable and non-taxable rents. . . .” Tax Law §1142.4 authorizes the State to “prescribe methods for . . . determining which [rents] are taxable and which are nontaxable” under the Sales Taxes. The HROT as enacted in 1970 authorized the City to “determine the taxable and non-taxable rents.” Code §VV46-11.0.5 (now Code §11-2511.5.)

and City taxes on hotel occupancies based solely on a novel reading of statutory language that, if applied literally, produces an absurd result.

Although we conclude that the State and City taxing authorities' long-standing interpretation of the permanent resident exemption is entitled to deference as reflecting legislative intent, nevertheless, if the relevant portions of the HROT Rules run "counter to the clear wording" of the statute, they should be given no weight.²⁴ Therefore, we must consider whether the relevant portions of the HROT Rules are consistent with the Code provisions.

Under Code §11-2501.8, "[a]ny occupant" of a hotel room or rooms for 180 consecutive days is a permanent resident "with regard to the period of such occupancy." An "occupant" is defined as a "person who, for a consideration, uses, possesses, or has the right to use or possess, any room or rooms in a hotel" Code §11-2501.3. "Occupancy" is defined as the "use or possession, or the right to the use or possession of any room or rooms in a hotel" Code §11-2501.4. Thus, an "occupant" is a person who, for consideration, has an "occupancy." The statute defines a permanent resident as an "occupant" having an "occupancy" of 180 consecutive days. Code §11-2501.8.

By defining a permanent resident using the defined terms "occupant" and "occupancy," the statute emphasizes the occupancy by that person rather than the nature of the person, in contrast to the exemptions for governmental and nonprofit entities in Code §11-2502.c. Code §11-2502.a provides that the HROT applies separately to each occupancy, and is imposed on the occupancy of a hotel room rather than directly on the occupant. Consistent with the taxation of the occupancy rather than the occupant, although a hotel

²⁴ Kurcsics, 49 N.Y.2d 451, 459 (citations omitted).

generally collects the HROT from the occupant, the hotel is liable for the HROT on an occupancy even if the hotel operator fails to collect the HROT from the occupant. Code §11-2505. It is consistent with the separate taxation of each occupancy for a person to be a permanent resident with respect to one occupancy for 180 consecutive days without being a permanent resident with respect to another occupancy of a shorter duration in the same hotel. Thus, the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 “Permanent Resident” are consistent with the statutory language. Having concluded that the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 “Permanent Resident” reflect the legislative intent behind the permanent resident exemption and are consistent with the statutory language, we find that those portions of the HROT Rules are valid.²⁵

We now address Petitioner’s alternative argument. Petitioner relies on the definition of “occupant” in Code §11-2501.3 as:

A person who, for a consideration, uses, possesses, or has the right to use or possess, any room or rooms in a hotel under any lease, concession, permit, right or access, license to use or other agreement or otherwise. (Emphasis added.)

Petitioner argues that the Agreements are enforceable requirements contracts giving Petitioner the right to use or possess rooms in the Hotels in exchange for consideration. Petitioner’s Brief in Support of Cross Exception at 4. Petitioner asserts that because the Agreements had terms longer than 180 days, Petitioner qualified as a permanent resident with respect to every room reserved and paid for under the Agreements regardless of how many consecutive days Petitioner occupied each room:

²⁵ By implication, Illustrations (iii) through (vi) of subdivision (3) of HROT Rule §12-01 “Permanent Resident,” although not at issue in this case, also are consistent with the statute and, therefore, valid.

Petitioner became obligated to pay for all required rooms and was obligated to submit its current requirements over the term of each Agreement Each requirements report was not a separate and identifiable agreement, but rather the effectuation of an overarching requirements contract. All obligations for [Petitioner] . . . with respect to the Agreements arose when the agreements were executed. As such, all rooms required during the [Tax Period] were requested and paid for pursuant to these Agreements and contained terms of longer than 180 days.²⁶

At oral argument, Petitioner conceded that the number of rooms to be occupied under the Agreements was indefinite at the beginning of the Agreements' terms and that the Agreements did not require Petitioner to reserve and pay for a specific minimum number of rooms. Petitioner relies on the backward-looking nature of the HROT²⁷ to retroactively establish the number of rooms covered by the Agreements as being the number of rooms actually reserved over the terms of the Agreements.

Petitioner also conceded that on the first day of the terms of the Agreements, the Hotels could not require Petitioner to pay any amount of rent for any rooms. But Petitioner argues that the law governing requirements contracts entitles the Hotels to expect that Petitioner's current requirements will be within some reasonable range of its historic use of hotel rooms, absent some change in circumstances, and Petitioner would be liable to the Hotels for damages if Petitioner does not reserve a number of rooms based on its current requirements.

²⁶ Petitioner's Brief in Support of Cross Exception at 25.

²⁷ Under the permanent resident exemption, although a person qualifying as a permanent resident is exempt from HROT as of the first day of the occupancy period of 180 or more consecutive days, that person must pay the HROT for the first 180 consecutive days of occupancy and cannot obtain a refund of the HROT paid until after the 180th consecutive day of occupancy. HROT Rule §12-01 "Permanent Resident" subdivision (1).

At oral argument, Petitioner asserted that the last sentence of subdivision (2) and Illustration (ii) of HROT Rule §12-01 “Permanent Resident,” even if valid, only impose the tax on the temporary occupancy of additional rooms by a permanent resident. Petitioner asserts that those provisions of the HROT Rules do not apply to Petitioner’s occupancy of rooms under the Agreements because Petitioner’s occupancy of rooms under the Agreements was not temporary.

It is not necessary for us to determine whether the Agreements are enforceable requirements contracts obligating Petitioner to reserve some number of rooms over the term of the Agreements and entitling the Hotels to damages for Petitioner’s breach. Even assuming that the Agreements are enforceable requirements contracts, Petitioner is misapplying the backward-looking operation of the exemption. To qualify as a permanent resident, a person not only must have the right to occupy a room or rooms in a hotel at the beginning of the 180-day period, that person also must continue to have that right throughout the 180-day period. That is why the person must pay HROT for the first 180 consecutive days of occupancy and is entitled to a credit or refund only after that person had met the 180-day occupancy requirement. HROT Rule §12-01 “Permanent Resident” subdivision (1).

Even if Petitioner had a right to occupy one or more rooms on the first day of the term of the Agreements, Petitioner regularly surrendered that right to the extent that the number of rooms reserved for a given night was less than the number of rooms reserved for the previous night. Taxpayer’s Exhibit 1 includes a document described by Petitioner’s witness, Connie Stilwell, as a “hotel requirements report,” which Petitioner sent to Marriott on a monthly basis to show how many rooms Petitioner would require for the month.²⁸ Tr. 17.

²⁸ Although Ms. Stilwell said the document showed Petitioner’s requirements for a month, the document appears to show Petitioner’s daily requirements for the period January 1, 2001, through May 31, 2003. This discrepancy is not explained in the Record.

Similar requirements reports for Park Central and Radisson were admitted into evidence as Taxpayer's Exhibits 2 and 3, respectively. The requirements report for Marriott shows that Petitioner reserved twenty-eight rooms for February 28, 2003, but only nine rooms for the next day, March 1. Petitioner reserved 104 rooms for December 13, 2002, but only thirty-two rooms for December 14, 2002. The requirements report for each Hotel shows similar fluctuations in the number of rooms reserved from day to day. These fluctuations show that regardless of any right Petitioner may have had to occupy rooms in the Hotels at the beginning of the term of each Agreement, Petitioner surrendered that right with respect to some number of rooms on a regular basis over the term of each Agreement. Therefore, Petitioner cannot qualify as a permanent resident for every room occupied and paid for in each Hotel during the Tax Period. At oral argument, Petitioner conceded that if, in good faith, Petitioner reserved a number of rooms for a given night that was less than the number Petitioner historically used, Petitioner had the right to occupy only that lesser number of rooms on that night.

At oral argument, Petitioner asserted that because all of the rooms it occupied at the Hotels during the Tax Period were reserved and paid for under the Agreements, those occupancies were not "temporary" within the meaning of the last sentence of subdivision (2) of HROT Rule §12-01 "Permanent Resident." We disagree. The permanent resident exemption contains the bright-line requirement that a permanent resident have an occupancy of a hotel room or rooms for a minimum of 180 consecutive days. The last sentence of subdivision (2) of HROT Rule §12-01 "Permanent Resident" reads: "Where a permanent resident rents additional rooms on a temporary basis, 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." (Emphasis added.) The phrase "such rooms" refers to the "additional rooms" rented "on a temporary basis." Thus, read in its entirety, the sentence clearly requires the "additional rooms" rented "on a temporary basis" to be occupied for a

full 180 consecutive days before they are eligible for the exemption. We think the clear meaning of the sentence is that any occupancy for a period of less than 180 consecutive days is temporary for that purpose. Petitioner's reading of that sentence would permit abuse of the exemption by allowing a person to qualify for the exemption with respect to any occupancy of a hotel room of any duration provided only that the occupancy was contracted for under an agreement having a term longer than 180 consecutive days.

Accordingly, we reverse the DCALJ Determination insofar as it held that the last sentence of subdivision (2) and Illustration (ii) of subdivision (3) of HROT Rule §12-01 "Permanent Resident" conflict with the statutory language and, therefore, we deny Petitioner's refund request and sustain the Notice.²⁹

Dated: June 29, 2009
New York, New York

GLENN NEWMAN
President and Commissioner

ELLEN E. HOFFMAN
Commissioner

²⁹ We have considered all other arguments raised by Petitioner and find them to be unpersuasive.