

REPORT #749

TAX SECTION

New York State Bar Association

Comments on Amendments

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TAX SECTION

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January 26, 1993

Ellen E. Hoffman, Esq.
Director, Tax Law Division
Department of Finance
345 Adams Street Brooklyn, NY 11201

Dear Ms. Hoffman:

Thank you for your letter of December 22, 1992, enclosing a revised draft of the proposed amendments to the Rules relating to the Commercial Rent or Occupancy Tax. We are pleased that as to the majority of the items discussed in the report enclosed with our letter of December 4, 1992, the revised draft adopts our recommendations or eliminates ambiguities or inconsistencies pointed out in our report.

However, there is one aspect of the revised draft which creates a major uncertainty that we believe requires further revision of the proposed amendments.

Under the previous draft, we had understood the language to be added to the definition of "Taxable premises" in the proposed amendments to §7-01 of the Rules as establishing that if an organization determined by the I.R.S. to be exempt from tax under I.R.C. §501(a) [other than an organization within §501(c)(2) or (25), and other than a §501(c)(3)-type organization eligible for the general exemption in Adm. Code §11-704, subd. a(4)] did not use premises substantially in connection with

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an unrelated trade or business within I.R.C. §513, such premises were not taxable premises. In the corresponding language in the revised amendments, which has been transferred to §7-06 of the Rules, it is provided merely that an organization's premises meeting the foregoing qualifications will be deemed to have rebutted the presumption of taxability, with additional language stating that "the burden of proving that premises used or occupied by such an organization are taxable premises is on the Commissioner of Finance." This would leave the clear implication that there may be facts which the Commissioner could bring forth that could establish that such premises were nevertheless taxable.

In our view, such an interpretation would not be correct. If an organization that has been determined to be exempt under §501(c)(1), or (4) through (24), is not substantially using premises in any unrelated trade or business within §513, that should be sufficient to establish that such premises are not taxable, without more.

Accordingly, we recommend that there be added to the substantive rule defining taxable premises in §7-01 (in addition to your restoration of the first sentence of the existing third unnumbered paragraph) a clear statement that premises satisfying the foregoing requirements are not taxable premises. Inconsistent language should be removed from the discussion of presumptions that has been added to §706. Furthermore, we think that desirable clarification would be provided if the contents of the second sentence of the third unnumbered paragraph of the definition of "Taxable premises" in existing §701, dealing with the premises of bar or other professional associations, were restored as an example of the application of the rules discussed above.

In addition, there remain two of the recommendations in our prior report which have not been incorporated in the revised draft which we still believe should be included in the final Rules. Without repeating the discussion in our previous report, we summarize below the

remaining recommendations we continue to urge you to adopt:

1. If only a discrete and segregable portion of the premises occupied by a Federally tax-exempt organization is used in connection with an unrelated trade or business, the Rules should provide that only that portion is taxable. See item 3 of our prior report.

2. If it is the Finance Department's understanding of the statute that, so long as an organization described in Adm. Code §11-704, subd. a(4) is not as an overall matter primarily operated to carry on profit-making activities, a particular premises occupied by the organization is exempt even if it is exclusively devoted to an unrelated trade or business, the Rules should so state explicitly. See item 4 of our prior report.

If you wish to discuss the above recommendations further, we shall be happy to do so.

Sincerely yours,

Robert J. Levinsohn
Co-Chair, Committee on
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RJL:rjs

cc:Simon G. Salas, Esq.