

December 17, 2013

[Taxpayer]

Re: Formal Ruling 13-\_\_

Dear \_\_\_\_\_ :

This is a formal ruling for [Taxpayer] regarding the applicability of the rooms tax to a lease from [Taxpayer's LLC] to [3d party LLC]. This ruling is based upon representations in your letters of [dates] 2013, and the materials you enclosed with each.

**RULING**

Based upon the facts presented, the Agreement between [Taxpayer's LLC] and [3d party LLC] is not subject to rooms tax.

**FACTS**

[Taxpayer's LLC] is a [state] limited liability company which acts as the Rental Manager of condominium units in [town], Vermont, owned by [Taxpayer], pursuant to a Unit Rental Management Agreement between the two companies.

[Taxpayer's LLC] has entered into an Agreement with [3d party LLC], a [state] limited liability company. [3d party LLC] is in the business of providing "short-term transient use accommodations to members or guests under the [3d party LLC] brand."

The Agreement is for lease of four furnished Residences, which include two 3-bedroom and two 4-bedroom units, specifically identified as Units [unit numbers]. These Residences are four of the condominium units [owned by Taxpayer and managed by Taxpayer's LLC].

The [3d party LLC] Agreement term is from August 1, 2012 to September 30, 2015, a period of three years and two months. The rent for the Agreement term is stated to be \$570,000; though this is apparently the rent for each year of the term, since the Agreement also states that of this \$570,000, \$135,000 per year is attributable to each 3-bedroom residence and \$150,000 per year to each 4-bedroom residence. The rent is due on the first day of each month, in equal monthly installments.

The Agreement term excludes six "Blackout Days" for two of the units, which are "anticipated due to bookings in place prior to the Effective Date" of the [3d party LLC] agreement. The rent is reduced on a per diem basis for each Blackout Day.

The Agreement requires various services described in Exhibit D to be provided "to each user of the Residences under this Agreement." [Taxpayer's LLC] has contracted with a company, [hotel management company], for hotel management services. Exhibit D describes services to be provided by [hotel management company] as follows: reservation confirmation, sending a Welcome Email prior to the guest's arrival with travel and arrival information, greeting the guest on arrival, tending to the guest during the stay, providing housekeeping services during the stay, providing listed kitchen and bathroom articles during the guest's stay, and providing a bill the night before departure. The bill will summarize incidental guest charges, but will not include the room rental charge.

Each "user" under the Agreement has access to [hotel] amenities described in Exhibit E, which specifies access to the [optional hotel facility], plus [percentage] discounts on [other optional amenities on-site and off-site].

The Agreement gives [Taxpayer's LLC] an Early Termination Right, which automatically terminates the lease with regard to any Residence which may be sold. In case of Early Termination, [Taxpayer's LLC] must either "honor all future reservations" for that Residence or "make available a comparable unit for the future reservations."

[3d party LLC] may use the property for "short-term transient use" in its "customary business" of "providing accommodations to members or guests under the [3d party LLC] brand." Unless [Taxpayer's LLC] grants prior written consent to [3d party LLC], [3d party LLC] is prohibited from any other assignment or sublet of the property, and may not market the Residences for lease as a "vacation rental by owner" through a realtor or Web site.

The Agreement grants [3d party LLC] "exclusivity," providing that during the Agreement term, [Taxpayer's LLC] will not contract with [2 other companies] or their affiliates to provide accommodations in the Residences.

[Taxpayer's LLC] agrees to provide [3d party LLC] "photographs, floor plans, amenities descriptions, and other marketing materials, plus use of [Taxpayer's LLC] service marks, trademarks, trade names, images, insignias and logos, "so that [3d party LLC] may accurately market the Residences."

The parties agree that the terms of the Agreement will be kept confidential by the parties and their representatives.

[Taxpayer's LLC] will maintain and repair the Residences, and may enter the property for these purposes and to inspect the property or to show it to potential buyers; but only with notice to [3d party LLC] and only at reasonable times, except in case of emergency.

In case of material breach by one party, the other party may terminate the Agreement with ten days' notice, and may "take any action available at law or in equity to enforce the performance of any obligation, agreement or covenant" in the Agreement. If [3d party LLC] breaches the Agreement, [Taxpayer's LLC] may recover amounts due from [3d party LLC] "as said amounts become due."

[3d party LLC] is a "Permitted User" under, and is subject to, the [Residences] Owners Association Rules and Regulations, which are incorporated into the Agreement.

The Agreement covenants to [3d party LLC] the right to quiet enjoyment.

## **DISCUSSION**

You have asked for a ruling on whether Vermont's rooms tax applies to the Agreement between [Taxpayer's LLC] and [3d party LLC].

### **Rooms Tax in General**

Vermont law imposes a rooms tax of nine percent of the "rent" of each "occupancy," to be collected by the "operator" of a "hotel." 32 V.S.A. § 9241(a). "Hotel" and "operator" are defined as follows:

(3) "Hotel" means an establishment which holds itself out to the public by offering sleeping accommodations for a consideration, whether or not the major portion of its operating receipts is derived therefrom and whether or not the sleeping accommodations are offered to the public by the owner or proprietor or lessee, sublessee, mortgagee, licensee, or any other person or the agent of any of the foregoing. The term includes but is not limited to inns, motels, tourist homes and cabins, ski dormitories, ski lodges, lodging homes, rooming houses, furnished-room houses, boarding houses, and private clubs, as well as any building or structure or part thereof to the extent to which any such building or

structure or part thereof in fact is held out to the public by offering sleeping accommodations for a consideration. . . .

(4) "Operator" means any person, or his or her agent, operating a hotel, whether as owner or proprietor or lessee, sublessee, mortgagee, licensee or otherwise; . . . .

32 V.S.A. § 9202(3), (4). [Taxpayer's LLC] is thus an operator of a hotel, since it is an agent of [Taxpayer], and as such, holds out the [Taxpayer] property to the public, offering sleeping accommodations for consideration. The question then is whether [Taxpayer's LLC]'s Agreement with [3d party LLC] for lease of the Residences would constitute a "rent" of "occupancy" subject to the rooms tax.

"Occupancy" is defined as follows:

(6) "Occupancy" means the use or possession, or the right to the use or possession, of any room or rooms in a "hotel" for any purpose, or the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of a room or rooms. The term shall not include occupancy by a "permanent resident" . . . .

32 V.S.A. § 9202(6). Thus, rental to a "permanent resident" is not an "occupancy" subject to the rooms tax. A person becomes a "permanent resident" after occupying a room in the hotel for at least 30 days:

(7) "Permanent resident" means any occupant who has occupied any room or rooms in a "hotel" for at least 30 consecutive days.

32 V.S.A. § 9202(7). The regulations additionally provide that a person may be a "permanent resident" from the first day of the hotel rental, if it is pursuant to a pre-existing lease:

"Permanent Resident" Defined.

\* \* \*

B. Tenants under leases covering at least thirty (30) days. A person who has a right to occupy a room pursuant to a pre-existing lease for at least thirty (30) consecutive days, or one calendar month, whichever is less, is considered a permanent resident for the entire period of occupancy pursuant to the lease.

Accordingly, no meals and rooms tax is payable with respect to any rent paid or received under the lease. If the lease is broken and actual occupancy is for less than thirty (30) days, or in the case of the month of February, less than the calendar month, such person will not be considered a permanent resident for any portion of the occupancy.

For purposes of this regulation, a lease is an oral or written agreement that creates a landlord-tenant relationship between the parties. A lease must contain the essential terms of the agreement, and transfers the right of exclusive possession to the tenant. A lease is distinguishable from a license or contract to occupy in which a hotel owner or operator retains rights of possession and care of the premises, and may revoke the occupancy at his or her pleasure.

The tax applies solely to occupancies by transient occupants or lodgers and does not apply when a lease creates a landlord-tenant relationship. Accordingly, occupancies by persons considered tenants under the provisions of the Vermont Residential Rental Agreements Act (RRAA), 9 V.S.A. § 4451 *et seq.*, are not subject to the tax. Conversely, agreements containing provisions inconsistent with the RRAA are not leases for meals and rooms tax purposes.

Department of Taxes Regulation (Reg.) § 1.9202(7)-1.B. Under the Regulation, if the Agreement between [Taxpayer's LLC] and [3d party LLC] qualifies as a "pre-existing lease," then [3d party LLC] would be a "permanent resident" from the first day of the hotel rental, and the rental would not be subject to rooms tax. To qualify, the Agreement must (1) create a landlord-tenant relationship; (2) contain the essential terms of a lease; (3) transfer the right of exclusive possession to the tenant; and (4) must not provide the landlord with retained rights of possession and care of the premises, or the ability to revoke the occupancy at his or her pleasure.

#### Pre-Existing Lease

##### (1) Creates a landlord-tenant relationship

The Regulation refers to the Residential Rental Agreements Act in Title 9 as the test for whether a landlord-tenant relationship is created. That reference is of use when the question relates to a residential agreement. It is inapplicable when, as here, the agreement is a commercial agreement, conveying to [3d party LLC] a leasehold interest in a portion of the

hotel, for [3d party LLC]'s use in its business of providing "short-term transient use accommodations to members or guests under the [3d party LLC] brand." In this case, the lease creates a commercial, rather than a residential, landlord-tenant relationship, as evidenced by the additional factors (2) through (4), discussed below.

(2) Contains the essential terms of a lease

The essential terms of a lease in this context are (1) the names of the parties; (2) a description of the leased property; (3) a statement of the lease's duration or term; and (4) the amount of the rent. See In re Williston Inn Group, 2008 VT 47, ¶ 15 (2008). All four essential terms are contained in the [Taxpayer's LLC] - [3d party LLC] Agreement. In particular, the description specifies the exact Residences being conveyed, and the lease term is stated as three years and 2 months. The rent is a specified annual amount and not a nightly charge, and in case of material breach by [3d party LLC], [Taxpayer's LLC] may enforce all of its rights under the Agreement, including the right to recover any amounts due as they become due.

(3) Transfers to tenant the right of exclusive possession

The Agreement conveys the right of quiet enjoyment to [3d party LLC]. It specifies "exclusivity" in that [Taxpayer's LLC] will not contract with [two other companies] for rental of the Residences subject to the [3d party LLC] Agreement. It is not clear whether this exclusivity clause prevents [Taxpayer's LLC] from contracting with any entity other than the two named to rent the Residences; but coupled with the quiet enjoyment clause, it appears to convey exclusive possession. The Agreement specifies several "Blackout Days" which are not subject to the Agreement, but these were identified at the time of the Agreement, and so do not contradict the quiet enjoyment for the lease term as described in the Agreement.

(4) Landlord does not retain rights of possession and care of the premises, or ability to revoke the occupancy at his or her pleasure

[Taxpayer's LLC] does not retain the unlimited right of possession to the premises, but may access the property only for the specified purposes of maintenance, repair, or showing the property, and only with notice and at reasonable times, except in case of emergency. This limited access seems to be the type of access retained by a landlord in a typical lease agreement.

[Taxpayer's LLC], through its subcontractor [hotel management company], will provide guest services such as housekeeping, normally provided by the operator of a hotel. These services will be performed for hotel guests who contract with and pay [3d party LLC] for the hotel stay. They reflect [3d party LLC]'s provision of guest services to its members and customers, performed by [Taxpayer's LLC] as a requirement of the Agreement.

[Taxpayer's LLC] may not terminate the Agreement at its pleasure. It is only able to terminate in case of [3d party LLC]'s material breach, and then, only with ten days' notice. If any of the Residences is sold, the lease automatically terminates, but in that case, [Taxpayer's LLC] must honor [3d party LLC]'s existing reservations or provide [3d party LLC] with a comparable unit. These provisions do not constitute a right in [Taxpayer's LLC] to revoke the lease "at its pleasure."

The Agreement meets the requirements for a pre-existing lease for purposes of exemption from the rooms tax as a permanent resident.

#### Optional Services by [Taxpayer's LLC]

[Taxpayer's LLC] may provide additional services to [3d party LLC] guests, and will present the guests with a bill for these charges. To the extent that these services are optional and not



intrinsic to the occupancy, the charges will not be "rent" subject to the rooms tax. "Rent" is defined in the regulations as follows:

Reg. § 1.9202(8)-1 Rent - Itemization of Charges

The charges for services, such as laundry service, and for facilities, such as the use of a swimming pool or exercise room, that are optionally available to hotel occupants at an extra charge do not constitute rent provided the charges are separately stated and itemized on the customer's bill or invoice. If the charges for any services or the use of facilities are not itemized, or the services or facilities are available without any charge in addition to that normally made for the room, the total amount charged is considered rent and is subject to meals and rooms tax.

Additional charges for items that are intrinsic to the occupancy are considered rent and are subject to the tax, even if such items are separately stated on the bill. Examples of such charges include, but are not limited to, charges for a lake or mountain view room, local telephone usage charges, the use of an extra bed or crib, the use of a safe, pet charges, and hotel or inn closure fees entitling occupants to exclusive use of the property. Itemized charges for the optional use of facilities, such as a pool or fitness center, or for access to items such as rental movies or cable television, may be subject to sales tax under 32 V.S.A. § 9771(4).

Reg. § 1.9202(8)-1.

**CONCLUSION**

The Agreement meets the requirements for a pre-existing lease for purposes of exemption from the rooms tax as a permanent resident. As a result of the Agreement, including its description of [3d party LLC]'s business and intended use of the property, [3d party LLC] will become the operator of the portion of the condominium hotel it has leasehold rights to, and will be liable for rooms tax on receipts from its members or customers for accommodations in the Residences. The taxable receipts would include any amounts other than itemized optional charges for items not intrinsic to the occupancy. 32 V.S.A. § 9202(8); Reg. § 1.9202(8)-1, 2. If guests who contract with [3d party LLC] pay [Taxpayer's LLC] for the room rental charge or any portion of it, [Taxpayer's LLC] may be liable for rooms tax on those receipts.

**GENERAL PROVISIONS**

This ruling will be made public after deletion of the parties' names and any information which may identify the parties. A copy of this ruling showing the proposed deletions is attached, and you may request within 30 days that the Commissioner delete any further information that might identify the parties. The final discretion as to deletions rests with the Commissioner.

This ruling is issued solely to the taxpayer and is limited to the facts presented, as affected by current statutes and regulations. Other taxpayers may refer to this ruling, when redacted to protect confidentiality, to determine the department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statutes or regulations.

You have the right to appeal this ruling within 30 days. 3 V.S.A. §§ 808, 815.

\_\_\_\_\_  
Emily Bergquist

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Date

Approved:

\_\_\_\_\_  
Mary N. Peterson  
Commissioner of Taxes

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Date