

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(12)S
Sales Tax
April 17, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000712A

On July 12, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jacqueline Holtzman, 2478 Edgemere Drive, Rochester, New York, 14612.

The issue raised by Petitioner, Jacqueline Holtzman, is whether sales and compensating use tax is imposed in connection with the services provided by Petitioner in the following three situations.

Situation #1

Petitioner goes to the home of a client and cooks and prepares several days worth of meals, using the client's food, and then packages and freezes the meals for later use. The client purchases the groceries ahead of time so that they are available to Petitioner for cooking and preparation of meals as described above. Packaging materials such as freezer-proof and oven-proof containers for frozen storage of the meals are provided by Petitioner. The packaging materials become the property of the client. Petitioner charges the client for cooking and preparing such food and for such packaging materials.

Situation #2

Petitioner purchases the groceries, and delivers the groceries to the client's home. Petitioner cooks several days worth of meals and packages the meals for frozen storage for the client to use at a later time. Petitioner offers a selection of meals from which the client chooses. The groceries purchased include the food and packaging materials necessary for the preparation of the meals. The groceries are purchased using Petitioner's funds. Petitioner's invoice to the client lists a total amount due which includes separately stated charges for the price of the food and packaging materials purchased by Petitioner and the cooking service provided by Petitioner. All packaging materials, which include freezer-proof and oven-proof containers, become the property of the client.

Situation #3

Petitioner forms two legal entities. Petitioner would be the owner of both entities and would actively participate in the operation of both entities. Entity A would purchase groceries, including packaging materials, for the client and deliver the items to the client's home. Entity B would perform the cooking and packaging services as described in Situations #1 and #2. The client would pay Entity A and Entity B separately.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such...or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax....

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law imposes sales tax upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink . . .

Section 1105(c) of the Tax Law imposes the sales tax upon the receipts from the sale of certain enumerated services.

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionary, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form . . . nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See sections 532.4 and 532.6 of this Title.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

* * *

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Section 527.8(f) of the Sales and Use Tax Regulations provides, in part:

Caterers. (1) Sales by caterers.

(i) All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable.

(ii) Sales of food or drink by caterers where the caterers merely deliver the items purchased and offer no other services after delivery are deemed to be sales for off-premises consumption and are taxable in accordance with the provisions of subdivision (a) of this section.

(iii) Sales of food or drink by caterers where the caterers deliver the items purchased and arrange the food on platters or place the drink in containers so that food or drink is ready to serve guests are taxable.

* * *

(2) Purchases by caterers.

* * *

(ii) Food and beverages for resale. Food, such as meat, vegetables, fruit etc., may be purchased exempt from tax by a caterer in accordance with section 528.2 of this Title. Food, such as candy and confections, which is taxable in accordance with section 527.1 of this Part and does not qualify for exemption from tax under section 528.2 of this Title, may be purchased for resale, and thus not subject to tax, provided it is sold to the customer as part of the catering service.

Beverages, such as fruit drinks, soft drinks, soda, cocktail mixers, bottled water, beer, wine and other alcoholic beverages which are taxable in accordance with section 527.1 of this Part and not exempt under section 528.2(b) of this Title may be

purchased for resale by caterers provided that such beverages are sold to the customer as part of the catering service. (Ice served in drinks may also be purchased for resale.)

* * *

(iii) Other property sold to customers.

(a) Tangible personal property which is necessary to contain an item of food or drink for delivery to the customer and which is transferred to the customer with the sale of the food or drink may be purchased for resale by caterers. Such property includes disposable containers, wrappers, cups, dinner plates, trays, platters and the accompanying lids.

(b) Tangible personal property which is not necessary to contain an item of food or drink for delivery to the customer may not be purchased for resale and is taxable when purchased by caterers, regardless of the fact that the item is transferred to the customer with the sale of food or drink. This includes napkins, stirrers, straws, plastic utensils, and other similar items.

Opinion

In Situation #1, Petitioner's services are limited to cooking meals in her client's home. The client provides the food. Since there is no sale of food or drink involved in situation #1, Petitioner is not selling food or providing a catering service within the meaning and intent of Section 1105(d) of the Tax Law and Section 527.8(f) of the Sales and Use Tax Regulations. Furthermore, the cooking service provided by Petitioner, taken by itself, is not one of the services enumerated as taxable under Section 1105(c) of the Tax Law. The purchase of the packaging materials by Petitioner for use in providing the non-taxable cooking service is considered to be incidental to the cooking service and is not considered to be a purchase for resale. Section 526.6(c)(7) of the Sales and Use Tax Regulations. Therefore, Petitioner should not collect tax from its client for cooking or providing the packaging materials. Petitioner must pay tax on its purchase of such packaging materials.

In Situation #2, Petitioner purchases the food and packaging materials using her own funds. Petitioner cooks several days worth of meals and packages the meals for frozen storage. When the client is billed for this service, a separate amount is stated for the price of the food and packaging materials purchased and a separate amount is stated for Petitioner's service of cooking the meals. The sale of food or drink in conjunction with cooking, heating or other services after delivery constitutes a taxable catering service within the meaning and intent of Section 1105(d)(i) of the Tax Law and Section 526.8(f) of the Sales and Use Tax Regulations, regardless of whether the amounts

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attributable to the different elements of the service are stated separately. Therefore, the service provided by Petitioner as described in Situation #2 constitutes a catering service subject to tax under Section 1105(d)(i) of the Tax Law. Petitioner must collect tax from its clients on its charges for such service, including charges for food and packaging materials. In Situation #2, the packaging materials purchased by Petitioner may be purchased for resale in accordance with Section 527.8(f)(2)(iii)(a) of the Sales and Use Tax Regulations, provided that a properly completed resale certificate is presented by Petitioner to the vendor within 90 days of purchase. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

In Situation #3, Petitioner is the owner of two separate legal entities, Entity A and Entity B. Entity A would purchase and deliver the groceries to the client. The client would be billed separately by Entity A for such groceries. The cooking services would be performed by Entity B. The client would be billed separately for such services by Entity B. In this case, Entity A would be required to collect sales tax on all taxable items, such as packaging, sold to the client. Separately stated charges for food exempt under section 1115(a)(1) of the Tax Law would not be subject to tax. Entity B's charges for cooking services would not be subject to tax.

We note that under certain circumstances, the existence of separate legal entities will not be recognized for sales tax purposes. If the affairs of one entity are so dominated or controlled by its affiliate that such entity is the instrumentality of the affiliate, the separate legal entities may be treated as alter egos of one another. See Fiur Co. v Ataka & Co., 71 A.D.2d 370; Harfred Operating Corporation, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S and Pasquale & Bowers, Adv OP Comm T&F, August 1, 1996, TSB-A-96(49)S. It cannot be determined from Petitioner's submission of facts whether Entity A is an alter ego of Entity B. If an examination of the relationship between the two entities showed that their status as separate entities should be disregarded for purposes of the sales tax, then the totality of the services performed by Entity A and Entity B would constitute a catering service subject to tax under Section 1105(d)(i) of the Tax Law, as in Situation #2. Petitioner would be required in that case to collect tax on such service.

DATED: April 17, 2001

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.