

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

TSB-A-07(2)S
Sales Tax
February 8, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050923B

On September 23, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Billmar Amusements NY Party Works, Inc., 130 Dale Street, West Babylon, NY 11704. Petitioner, Billmar Amusements NY Party Works, Inc., provided additional information pertaining to the Petition on October 25, 2005.

The issue raised by Petitioner is whether its charges for providing various forms of entertainment for customers' parties and other functions are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is an entertainment specialist that has a wide range of entertainment options available for various types of parties and functions. Petitioner advertises the following product and service categories on its Web site:

- Inflatable & Interactives
- Unique Photo Items
- Arcade/Video Games/Simulators
- Casinos
- Music
- Team Building/Corporate Events
- Total Event Planning
- Carnivals
- Game Tables
- Virtual Reality
- Food Machines & Snacks
- Party Favors, Entertainment, Arts & Crafts
- Trade Show/Traffic Builders

Petitioner also has a variety of options in each of these categories. Some examples of the options available are:

- Inflatable slides, obstacle course, ball ponds, and bounces
- Kiddie rides
- Carnival type games and contests
- Decorations
- Arts and crafts
- Clowns, magicians, fortune tellers, circus performers
- Designed T-shirts
- Caricatures and specialty photos
- Photo booths
- Games tables, arcade games, video games, virtual reality
- Musical entertainment (i.e., DJ, dancers, music video)
- Food machines (i.e., popcorn, cotton candy, candy, and snacks)

Petitioner states that one or more staff members attend each event. The staff members' duties at the events vary depending on the option the client has chosen. The duties may range from setting up, maintaining, overseeing, and taking down equipment to performing (e.g., magicians, DJs, and clowns.) In addition, Petitioner may provide popcorn, cotton candy, or snack machines at an event.

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 as a physical component part of tangible personal property, 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.

(6) Tangible personal property. Corporeal personal property of any nature. . . .

Section 1105(a) of the Tax Law imposes sales tax upon "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1105(d)(i) of the Tax Law imposes sales tax on:

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; and

(3) in those instances where the sale . . . is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

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

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) *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.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

* * *

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

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. (1) The words *sale*, *selling* or *purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words *sale*, *selling* or *purchase* are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

* * *

(e) Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

(4) *Transfer of possession* with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

Section 526.8(a) of the Sales and Use Tax Regulations provides, in part:

Definition. The term *tangible personal property* means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:

* * *

(3) artistic items, such as sketches, paintings, photographs, moving picture films and recordings; . . .

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Section 527.8(f)(2)(ii) of the Sales and Use Tax Regulations provides:

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.)

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

Resale. (1) Any person purchasing food or drink for resale as such is required to pay tax thereon at the time of purchase.

(2) When the food or drink is subsequently resold, the seller is required to collect tax from the purchaser.

(3) The tax paid by the seller may be taken as a credit against the tax which the seller is required to collect and remit on the subsequent sale. The credit is limited to the amount of tax actually paid on the purchase by the seller of the food and drink resold.

Opinion

Petitioner provides a wide range of entertainment options for various types of parties and events. Petitioner states that one or more staff members attend each event. Petitioner's staff members' duties vary based on the entertainment option the client purchases.

Entertainment services such as performances by clowns, DJs, magicians, musicians, and dancers are not among the specifically enumerated services subject to sales tax under section 1105(c) of the Tax Law. Therefore, Petitioner's charges for the services of entertainers only, (such as clowns, DJs, magicians, musicians, and dancers) without the provision of equipment or other tangible personal property or food items to the client, are not subject to sales and use tax.

When Petitioner rents entertainment equipment for use by clients and their guests (e.g., inflatable slides, obstacle courses, ball ponds, bounces, kiddie rides, carnival type games and contests, game tables, and arcade games), Petitioner may be considered to be renting tangible personal property to its clients. Petitioner states that a staff member always accompanies the equipment. If the staff member maintains control of the equipment (e.g., rides such as merry-go-rounds, ferris wheels, and pony rides), and uses the equipment to entertain the client and guests, Petitioner may be considered to be providing a nontaxable entertainment service. However, if a staff member is merely present to set up and take down the equipment, ensure it is not damaged, and instruct the client and guests on the use of the equipment, Petitioner is not considered to be retaining control of the equipment and is considered to be renting the equipment to the client. See section 526.7(e)(4) of the Sales and Use Tax Regulations. In the case of inflatable equipment as well as pinball and similar machines, it appears that Petitioner provides staff for its own benefit and the client hires Petitioner primarily for the purpose of providing the equipment. Once the equipment is assembled, if the client and guests are able to use it without needing a staff member's involvement, the charge for providing the equipment for the client's event is a charge for the rental of tangible personal property. Such rental charges are subject to sales tax under section 1105(a) of the Tax Law.

When Petitioner provides entertainers and the rental of property for a single charge, the charge represents a mixed sale of a nontaxable service and a taxable rental of property. When tangible personal property composed of taxable and exempt items are sold as a single unit, tax is to be collected on the total price. See section 527.1(b) of the Sales and Use Tax Regulations. The rule is likewise applicable to sales of taxable and exempt services and sales of services combined with sales of tangible personal property. See *Pricewaterhouse Coopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S. Therefore, the entire amount charged for the entertainment service and equipment rental is taxable unless the entertainment service and equipment rental are separately available to clients and the amounts charged for the

entertainment service and equipment rental are separately stated and reasonable. If entertainment service and equipment rental are separately available and the charges are stated separately and reasonable, the receipts from the equipment rental are taxable and the charge for the entertainment service is not taxable.

Clients may also choose from Petitioner's options to provide clients' guests with various types of novelty items (e.g., arts and crafts, designed t-shirts, caricatures, and specialty photos) that are created for them at the event by Petitioner's artists or photographers. These items are typically customized for each guest and may be personalized. In these instances, Petitioner is providing its clients with novelty items for their guests to take home. These items are tangible personal property subject to sales tax under section 1105(a) of the Tax Law. Petitioner also provides photo booths, which are typically stand-alone equipment, used to provide the client's guests with pictures. While Petitioner may provide staff to assist guests with the photo booth, the photos are ultimately what the client is paying to receive. Accordingly, Petitioner's receipts from providing novelty items and photos are subject to tax under section 1105(a). See *Matter of Video Memories Associates, LTD, and Michael Marano, As Officer*, Dec Tax App Trib, March 14, 1996, DTA No. 812291.

Petitioner also advertises that it provides decorations for theme parties and events. The provision of such items by Petitioner to the client is considered to be the sale or rental of tangible personal property subject to New York State and local sales taxes under section 1105(a) of the Tax Law.

Petitioner may make exempt purchases of tangible personal property if the property is purchased exclusively for resale as such, or as a physical component part of tangible personal property that will be resold. See section 1101(b)(4)(i) of the Tax Law. If the items instead are used by Petitioner in the performance of its nontaxable entertainment services, Petitioner is required to pay sales or use tax on such purchases. See section 526.6(c)(7) of the Sales and Use Tax Regulations.

When Petitioner provides services and delivers tangible personal property to a location outside of New York State, the receipts are not subject to New York State or local sales taxes. See sections 525.2(a)(3) and 526.7(e) of the Sales and Use Tax Regulations.

If Petitioner provides an option that includes food such as popcorn, cotton candy, or snacks (as distinguished from charges for merely renting the customer the use of popcorn and cotton candy machines), the entire charge for food, drink, and entertainment would be subject to the sales tax imposed under section 1105(d)(i) of the Tax Law. It should be noted that if Petitioner provided popcorn or cotton candy machines, the food supplies needed to stock the machines, and staff to operate the machines and dispense popcorn or cotton candy to guests the section 1105(d) tax would apply. All charges for the provision of entertainment in conjunction with the provision of food and drink, regardless of whether such charges are separately stated, are subject to tax. See *Dianne C. Hoffman, C.P.A.*, Adv Op Comm T&F, December 27, 1993,

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TSB-A-93(64)S. Petitioner may purchase non-exempt food and drink items, such as candy, confections, fruit drinks, soft drinks, soda, bottled water, etc., for resale provided these items are sold to the customer as part of Petitioner's services. See section 527.8(f)(2)(ii) of the Sales and Use Tax Regulations. However, Petitioner's purchases of food and drink subject to sales tax under section 1105(d) (e.g., heated foods, prepared foods such as arranged platters of cold cuts, sandwiches) may not be made for resale. Petitioner must pay tax on such purchases and claim a credit against the tax which Petitioner is required to collect on the subsequent sale of such food and drink to clients. See section 527.8(i) of the Sales and Use Tax Regulations.

DATED: February 8, 2007

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