

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(12)S
Sales Tax
April 5, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090825C

Petitioner, [REDACTED] asks whether the sales of the food that it produces for a related entity and that is sold to a Concessioner at a major sport facility (Stadium) are subject to tax.

We conclude that Petitioner's parent entity must collect and remit tax on its sales of food and services related to that food, notwithstanding that Petitioner delivers the food in an unheated state to the Stadium where it is consumed, because other entities related to Petitioner provide services with respect to the food at the Stadium on Petitioner's behalf. The unrelated Concessioner who purchases the food from the Petitioner may take a credit on its sales and use tax return for the amount of the tax it paid to Petitioner's parent entity against the amount of tax it collects on its sales of that food to its customers.

Facts

Petitioner presented the following statement of facts: Petitioner was formed as part of a larger group of related restaurant entities (Restaurant Group) that are well known in New York City for the quality of their food products and services. In particular, Petitioner was formed to provide food products to sports facilities and other large-scale entertainment venues. Related entities provide catering and food management services. Petitioner and its related entities attempt to recreate the cuisine and eating experience offered at the restaurants that make up the larger Restaurant Group. The parent entity of the Restaurant Group is responsible for catering off-premises events ranging from small, elegant dinner parties to corporate events serving 1500 people, to wedding receptions. Petitioner only produces and delivers the food to the sporting facilities, while a related entity provides employees who perform certain management services overseeing the overall service of the food at the Stadium. Such management services are necessary to ensure that the food produced by Petitioner is served in the concession areas in a manner consistent with the standards maintained by the overall Restaurant Group.

The parent entity of the Restaurant Group has a contract to provide food and management services with the Concessioner at the Stadium:

“[The Parent Entity] shall obtain the products required for the preparation of the Approved Menu Items and Premium Menu Items from [the Concessioner's] customary suppliers assuming such products meet or exceed [the Parent Entity's] product specifications as identified in the Budget and are consistent with Standards. If any such products are not available from [the Concessioner's] customary suppliers, [the Concessioner and the Parent Entity] shall work closely together and obtain such products from [one of the] specialty vendors [i.e., from the larger Restaurant Group].”

The contract also has provisions that allow the facilities run by the Concessioner at the Stadium to use the names of the restaurant facilities belonging to the entities of the Restaurant Group. Because the food provided at the Stadium is identifiable to the overall Restaurant Group, the contract places emphasis on maintaining the branded food's standards. While the food is prepared and served at the Stadium by Concessioner's employees, employees of one of the related restaurant entities are present at the Stadium to monitor the service of the food by the Concessioner's employees. The reputation of its food is of such

concern to the Restaurant Group that the contract between the Concessioner and the Restaurant Group allows a related restaurant entity from the Restaurant Group to have a say in the training and selection of the Concessioner's employees.

Petitioner's role within the Restaurant Group is to be "specialty vendor" as required by contract. The food items made in its kitchen could not be purchased from another vendor, since they are the type of foods that are identified, by brand name, as originating with the entities of the Restaurant Group. Ninety percent of Petitioner's business is producing these distinctive branded specialty foods from raw ingredients. These include: spare ribs, pulled pork, chicken wings, hamburgers, tacos, French fries, salsas, and various sauces. Petitioner rubs or marinates the ingredients, cooks, cools and then prepares and packages the finished food products for delivery to the Stadium. The food is unheated when sent to the Stadium, and the Petitioner itself provides no services at the Stadium after it delivers the food. After delivery to the Stadium, additional preparation of the food may be required. For example, the prepared wings need to be deep-fried by the Concessioner. Employees of other entities of the Restaurant Group provide services related to food at the Stadium. Even though the food products are sold at the Stadium by the Concessioner, the food products are identifiable by brand as originating with either Petitioner or a related entity, and are in many instances sold at eating locations at the Stadium that use the name of an entity of the larger Restaurant Group.

Petitioner produces food at a kitchen facility shared with a related catering entity. Petitioner's stadium contract is a seasonal business, but the same or very similar food is produced year round at this facility by the related catering entity. In the off season, the cooks that work for Petitioner work for one of the related entities of the Restaurant Group, while the stand managers located at the Stadium (who work for a related entity) are laid off until the next season.

The Concessioner signed one contract with the parent entity of the Restaurant Group; it did not want to enter into separate contracts with each of the subsidiaries of the Restaurant Group. The charges for the food produced by Petitioner are invoiced directly to the Concessioner by Petitioner, and are separate and apart from the invoices for other charges (such as for the services of the related entities' employees). Although the invoice is provided to the Concessioner by Petitioner, payment is made by the Concessioner to the parent entity. The parent entity then redistributes the amounts paid within the corporate group, including payment for the cost of the food sold by Petitioner.

Every item sold by Petitioner under the contract requires some amount of preparation by Petitioner before the items are delivered to the Stadium. Petitioner does not provide any items to the Concessioner in the same form in which it received them.

Analysis

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from every "retail sale" of tangible personal property, except as otherwise provided in the Tax Law. Tax Law section 1115(a)(1) exempts receipts from the sale of "food, food products, and beverages" sold for human consumption. But that section does not exempt the sale of any food or drink from the tax imposed by section 1105(d) of the Tax Law. Tax Law section 1105(d)(i)(2) imposes sales tax on every sale of food and drink, or of food alone, 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."

While Petitioner does not itself provide any services at the Stadium beyond the delivery of the food, services with respect to the food are provided by employees of entities related to Petitioner. The Restaurant

Group is concerned with the way the food is served at the Stadium, because the foods (and the locations at which the food is served) are identifiable with the entities in the Restaurant Group. The employees of the related entities oversee the way the food is served at the Stadium. In addition, under the contract between the Concessioner and the parent entity, a related entity in the Restaurant Group has a say in the training and selection of the Concessioner's employees who prepare and serve Petitioner's food. Moreover, the contract between the Concessioner and the parent entity, in effect, arranges for the parent entity and others in the Restaurant Group to provide services with respect to the food provided by Petitioner. Thus, because Petitioner is providing prepared food to the Concessioner in conjunction with its parent entity's contract with the Concessioner, and employees of the entities related to Petitioner are providing services with respect to that food at the Stadium under section 1105(d)(i)(2), State and local sales taxes must be collected and remitted on the charges for the prepared food Petitioner provided to the Concessioner.

The nature of the relationship between Petitioner and its parent entity with regard to the billing for the products sold by Petitioner and the remuneration provided by the Concessioner is unclear in the Petition. However, because Petitioner submits the invoice to the Concessioner and the parent entity initially collects the receipts on behalf of Petitioner, both entities are jointly and severally liable for the payment of the tax to the Department (see § 1101(b)(8)(ii)(A) of the Tax Law). As the entity that receives the tax receipt for the Concessioner, the parent entity appears to be the entity that should register and remit tax.

The Concessioner may apply for a credit in the amount of the tax it pays to the parent entity on its purchase of food products from Petitioner against the tax it collected on its sales of that food at the Stadium and that it reports on its sales tax returns. See section 527.8(i) of the Sales and Use Tax Regulations; *Billmar Amusements NY Party Works, Inc.*, (TSB-A-07(2)S).

The issue of the tax treatment of the services provided by the related entities at the Stadium was not raised in the Petition. However, it must be noted that section 527.8(f)(1)(i) of the sales and use tax regulations requires that all charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating, or other services after delivery are subject to State and local sales taxes at the rate in effect where the food and services are delivered. This would include charges by the parent entity on behalf of itself or a related entity for the services of the employees of the Restaurant Group who monitor or otherwise assist in the delivery of the food at the Stadium. As is the case for the charges for the food, the Concessioner would be allowed to take a credit for the tax paid on such services on its own sales and use tax return.

DATED: April 5, 2010

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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