

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-91 (22)S
Sales Tax
February 22, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900620B

On June 19, 1990 a Petition for Advisory Opinion was received from 89 Cragg Road Inc. DBA Island Cottage, 953 Edgemere Drive, Rochester, New York 14612.

The issue raised by Petitioner, 89 Cragg Road Inc. DBA Island Cottage, is whether it is responsible for the collection of sales tax on receipts from cover charges collected by entertainers from customers at the door of the establishment.

Petitioner owns and operates a tavern at 953 Edgemere Drive, Rochester, New York 14612. Petitioner's principal business consists of selling and serving beverages. Petitioner, after executing a written statement of understanding, allows various performers to entertain at the tavern. Petitioner treats this arrangement as simply providing a place for the entertainers to perform. Petitioner does not enter into any monetary transactions with the entertainers. As stated in the written statement of understanding, the entertainers are responsible for setting any fees. Petitioner does not set a maximum or minimum fee. The entertainers are responsible for collecting any fees. Petitioner will supply an employee to collect money at the door if the entertainers so desire but this is not required by the Petitioner.

No accounting of the money collected by the entertainers is made by Petitioner. Further, no accounting of the collections is required by Petitioner to be made by the entertainers. No money from these collections is ever deposited into the accounts of Petitioner. No entries onto the books of Petitioner is ever made. Petitioner never includes any of the collected money in any financial reports made to governmental agencies, for internal purposes or to any other interested parties (i.e.: creditors). The entertainers set the level of charges to be assessed. Petitioner never guarantees any minimum number of customers nor does Petitioner guarantee a minimum amount of receipts. Petitioner never pays the entertainers from any of its own funds. Petitioner does not pay the entertainers a substituted amount if receipts are low. The entertainers keep all receipts and do not pay Petitioner a percentage of the receipts. Petitioner does not collect a flat fee from the entertainers. There is no compensation or commissions paid to Petitioner from the entertainers. The statement of understanding does not require the entertainers to entertain on any particular date. It is not a contract for personal services. It does not provide for any compensation to the entertainers.

Petitioner never receives, collects or reports any cover, minimum or entertainment charges from the customers. Petitioner makes it clear through the statement of understanding with the entertainers that Petitioner does not treat itself as the vendor of the entertainment. Petitioner has no direct interest in the entertainment fee charged by the entertainers. The entertainers are never an

expense to Petitioner. Petitioner never receives income from the fees charged by the entertainers.

Tax Law section 1105(d)(i) of the Tax Law in part imposes sales tax upon:

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. . . .

The charge imposed upon patrons for admission to Petitioner's tavern constituted a "cover, minimum, entertainment or other charge" within the meaning of Tax Law section 1105(d)(i). As a result, such charges are subject to sales and use taxes.

Section 1101(b)(8)(i)(A) includes within the meaning of "vendor," "A person making sales of tangible personal property or services the receipts from which are taxed by this article."

Petitioner's agreement with the entertainers is solely to allow them to use its premises. The agreement provides that the entertainers will perform in exchange for the cover charge only. The entertainers decide the amount of the cover charge and provide someone to collect it. Petitioner does not have any financial control over the entertainers whatsoever. Under the specific fact pattern presented by Petitioner, the entertainers and not Petitioner are vendors within the meaning of Section 1101(b)(8)(i)(A) of the Tax Law responsible for collecting the sales tax imposed under Section 1105(d)(i) of the Tax Law.

DATED: February 22, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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