

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

TSB-A-98(21)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971015B

On October 15, 1997, a Petition for Advisory Opinion was received from UM Enterprises Ltd., 711-5 Koehler Avenue, Ronkonkoma, New York 11779.

The issues raised by Petitioner, UM Enterprises Ltd., are whether:

(1) Property and services contracted for by Petitioner can be purchased for resale.

(2) Petitioner is entitled to a refund or credit of sales and compensating use tax paid on its purchases of property and services.

Petitioner submits the following facts.

Petitioner, which does business as Enchanted Parties, is in the business of event planning and production. Petitioner plans events such as weddings, bar mitzah, picnics and house parties. An individual client contracts with Petitioner to plan an event. Petitioner makes all necessary arrangements for the event, based on its discussion with the client. As part of its responsibilities, Petitioner contracts with various companies for such items of tangible personal property as a tent (if the event is an outdoor function), tables, chairs and any other items that are needed for the event. Petitioner may arrange for performers such as magicians or clowns to entertain at events. Food and drink are provided for some, but not all, events planned by Petitioner. Where food and drink are provided, Petitioner generally hires a caterer to prepare and serve the food and drink. Petitioner coordinates the various segments for the event and pays the suppliers for the rentals, services and food and drink. Petitioner issues resale certificates to all vendors and does not pay tax on its purchases, and charges its clients sales tax on the cumulative total of Petitioner's expenses plus a fee for the coordination of the event.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale," in part, as:

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) and (5) of subdivision (c) of section eleven hundred five . . .

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.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(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; 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 527.8(f)(2) of the Sales and Use Tax Regulations provides, in part:

Purchases by caterers. (i) Self-use. Tangible tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to tax. Examples of such taxable property are: tables, tents, chairs, bars, linens, napkins, silverware, glassware,

chinaware, serving utensils, table covers, ice used to chill food or drinks before serving, as well as floral arrangements not purchased in accordance with the conditions set forth in subparagraph (v) of this paragraph. (Emphasis supplied)

(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. (Emphasis supplied)

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.) (Emphasis supplied)

Example 4: A vendor has contracted to cater an outdoor party at a private residence. The caterer is responsible for making all arrangements for the customer such as providing a tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor, bars, floral arrangements for the tables, a band, serving personnel (who are employees of the caterer), food (roast beef, salad, vegetables and dessert all prepared by the caterer), alcoholic beverages, soft drinks and valet service. The caterer must pay tax on any rental or purchase of the tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor and bars, as well as any floral arrangements not purchased in accordance with the conditions set forth in subparagraph (v) of this paragraph.

The charges by the band and by the valet service are not taxable to the caterer since they are not services subject to tax. The caterer's purchases of the uncooked meat and the salad, vegetable and dessert components are exempt from tax in accordance with section 528.2 of this Title. The caterer's purchases of alcoholic beverages and soft drinks are purchases for resale, not subject to tax, in accordance with section 527.1(a) of this Title. The caterer's entire charge to the customer is taxable.

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(iv) Taxable food or drink. Purchases by caterers of prepared food or drink (taxable under subdivision (a) of this section) may not be made for resale and are subject to tax at the time of purchase. However, a caterer may take a credit on its sales tax return for the tax paid on such food. (See subdivision (i) of this section for more information on the purchase of food or drink for resale.) (Emphasis supplied)

Example 5: A caterer has several parties at one time and is unable to prepare all the food for the various groups. The caterer purchases prepared meat platters and prepared hot and cold salads to distribute to the various catered groups. Although the caterer may not purchase the prepared food exempt from tax as a purchase for resale, it may claim a credit when reporting its catered sales on its sales tax return for the tax paid on the food.

Section 527.8(i) of the Sales 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

In this case, Petitioner makes all the arrangements for its clients' events. Petitioner obtains a tent, if the event is outdoors, chairs, tables, silverware, the catering service for food and drink, a band and any other items needed for the event. Petitioner has been issuing a resale certificate to suppliers in order to make purchases tax exempt and then charging its clients tax on its entire bill, covering the cost of Petitioner's expenses and its fee.

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property. Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale" as the sale of tangible personal property to any person for any purpose other than for resale as such or for use in performing services taxable under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of Section 1105 of the Tax Law. Petitioner is not reselling to its clients the tangible personal property it rents from suppliers. The rentals are used by Petitioner in providing the total service package to its clients of planning and producing the event. Petitioner is providing a taxable catering service under Section 1105(d)(i) of the Tax Law, if there is food or drink served at the event. If there is no food or drink at the event, Petitioner is providing a non-

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enumerated service which is not taxable. Accordingly, Petitioner's rentals of tangible personal property are not for resale, and Petitioner should not furnish resale certificates to its suppliers. (See Java Caterers, Inc., Dec St Tx Comm, February 6, 1985, TSB-H-85(101)S). Consequently, Petitioner should always pay tax to its suppliers on the tangible personal property it rents.

Where Petitioner furnishes food and drink for an event, Petitioner's charges for catering the food and drink and any other charge for the coordination of the event are subject to tax under Section 1105(d)(i) of the Tax Law. (See Stouffer Management Food Service, Inc. v. Tully, 98 Misc 2d 1128, affd without opn 69 AD2d 1023, mot for lv to app den 47 NY2d 709).

Petitioner may purchase food and non-alcoholic beverages exempt from tax, under Section 1115(a)(1) of the Tax Law. Petitioner may purchase non-exempt food and drink, such as candy and confections, fruit drinks, soft drinks, soda, cocktail mixers, bottled water, beer, wine and other alcoholic beverages, for resale, provided these items are sold to the customer as part of the catering service (see Section 527.8(f)(2)(ii) of the Sales and Use Tax Regulations). In accordance with Section 527.8(f)(2)(iv) of the Sales and Use Tax Regulations, Petitioner cannot purchase prepared food and drink for resale, and must pay tax to its supplier at the time of purchase. However, Petitioner may take a credit on its sales tax return for the tax paid on such prepared food and drink. (See Sections 527.8(f)(2) and 527.8(i) of the Sales and Use Tax Regulations regarding the purchase of food or drink for resale.)

In those instances where Petitioner makes arrangements for an event and there is no sale of food or drink involved, Petitioner is not performing one of the enumerated taxable services under Section 1105 of the Tax Law. Petitioner's charges to hire the services of a magician, clown, band or other performer are not subject to sales tax.

DATED: March 24, 1998

/s/
JOHN W. BARTLETT
Deputy Director
Technical Services Bureau

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