

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

TSB-A-12(25)S
Sales Tax
October 15, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100310A

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED]. The Petitioner owns a hotel, and pursuant to the contracts provided with the Advisory Opinion it asks: (1) is it purchasing AV services from the AV provider; and (2) whether it would be treated as the vendor of such AV services by the AV provider at its hotel location.

We conclude that in those instances where the AV provider enters into a separate agreement with hotel guests or customers for providing AV services at a specific event, the hotel is not purchasing the AV services from the AV provider. However, the hotel may be considered to be acting as co-vendor if it collects the payment from the customer and that payment includes taxable receipts.

Facts

Petitioner owns a hotel located within New York State. The hotel serves as a venue for many types of events, including those which require the provision of AV equipment and services (e.g. conferences, and professional meetings). For these types of events, the hotel will offer its customers various services including ballroom or meeting room rentals, guest rooms, and food and drink. The hotel does not own AV equipment and its staff does not provide AV services to its customers. The hotel has entered into a contract with an AV service provider that specifies that the AV provider is the sole in-house provider of AV services and equipment and that the AV provider is to provide such services at the hotel for the benefit of the hotel and its customers. The contract also provides that the AV provider will act as an independent contractor with its own employees, and will operate from a designated location within the hotel. In return, the AV provider agrees to perform its services to the hotel's customers in the manner expected by the hotel, and to pay the hotel a commission (generally 40% and up) from the proceeds of its equipment rentals and AV services. The contract requires the AV provider to cooperate and coordinate with an outside AV provider if one is selected by the hotel guest.

When scheduling an event, the hotel will enter into a contract with the customer for that event. This contract generally governs the services that the hotel will provide for the event. When a customer requires AV equipment and services for their event (such as a projector, microphone, screen, recording equipment or similar services), the hotel will direct the customers to meet with the on-site representative of the AV provider. The hotel's contract with the customer may reference the AV provider and the AV provider's ability to provide AV services and equipment, but it makes no mention of the other terms of the hotel's arrangement with the

AV provider, nor does it require that the customer contract with the AV provider. In order to obtain AV services at its event, the customer must enter into a separate contract with the AV provider or contract with an outside AV provider.

Depending on the services to be provided to the client, the hotel may collect from the customer the entire fee for the event, including the amounts for the AV services. The AV service contract used for a meeting room rental will specify that if the customer requires any rigging services (as opposed to the renting the AV equipment) for the event, these services must be provided through the on-site AV provider. While a hotel customer is free to bring in their own outside contractor to provide AV equipment and related services, the customer and the outside AV provider must follow certain guidelines. In certain instances when using an outside AV provider, the customer can be required to pay for an employee of the on-site AV provider to be present at the event.

While the hotel's contract with the AV provider provides that the AV provider operates as an independent contractor, the contract acknowledges that the manner in which the AV provider rents the AV equipment and delivers its services will reflect upon the hotel. For this reason, the contract requires that the AV provider operate within a number of detailed guidelines. For example, the contract provides that the AV provider is required to render its services and equipment to the hotel at no charge for use at the hotel's own events (such as staff meetings or training classes). The contract not only details staffing levels expected of the AV provider, but also provides detailed lists of the type and amount of equipment to be located at the hotel. In addition, the hotel has the right to establish rules and regulations relating to the appearance and conduct of the AV provider's employees.

As noted above, the AV provider enters into a separate agreement with the hotel's customer for the provision of its services. The hotel is not a party to these agreements. The agreement between the AV provider and the customer does permit billing for the AV services provided at an event to be made through the customer's master account at the hotel. However, the customer may choose to be billed directly by the AV provider.

When charges for the AV services are billed through the customer's master account at the hotel, the charges for the AV equipment rentals and AV services are separately stated as a miscellaneous charge on the hotel's bill to the customer. If collected through the master account, the hotel will generally remit to the AV provider the total amount collected (less the hotel's commission), including any sales tax charged to the hotel customer. The AV provider then remits the applicable sales tax paid by the hotel customers on its next sales tax return. In some cases, however, the hotel remits the tax paid by the customer for the AV services directly on its own sales tax return. If the AV provider bills the customer directly, it must provide a summary statement to the hotel. The summary includes a calculation of the hotel's commission and any revenues resulting from the AV equipment rented and/or services provided by AV provider.

The hotel does not guarantee collection of the AV service charges from the hotel's guests. Indeed, even where the customer is billed through its master account, its payment obligation is to the AV provider, not to the hotel. Pursuant to the contract between the hotel and the AV

provider, the AV provider bears the risk of loss for its charges on the master account and has the responsibility to collect the amounts due directly from the customer if the customer does not make full payment on the master account to the hotel.

Analysis

Tax Law §1105(a) imposes a tax on every retail sale of tangible personal property in the State. Pursuant to Tax Law section 1101(b)(4)(i)(A), a sale of tangible personal property for use in performing certain enumerated services is not considered to be a retail sale and is not, therefore, subject to tax. However, catering services, which are taxable under Tax Law section 1105(d), are not one of those services. For the purposes of the sales and use tax, a rental is a sale (Tax Law §1101(b)(5)). Section 527.8(f)(2)(i) of the Sales and Use Tax Regulations state that "[t]axable 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." For the purposes of AV services, if the Petitioner were to contract with its customer for the provision of the AV services, but then hire an AV provider to provide such services to its customer, the sale of such service to the Petitioner would be subject to tax. *See Matter of 21 Club, Inc. v. Tax Appeals Tribunal*, 69 AD3d 996 (3d Dep't. 2010).

Similar to the petitioners in TSB-A-11(27), Petitioner does not enter into a contract for the rental of the AV equipment to its customers. Petitioner's agreements with its customers do not include the terms of the rental of the AV equipment. That is left exclusively to the separate agreement between the customer and the AV provider. The equipment is owned by the AV provider, and only its employees may handle it. While the Petitioner may establish general guidelines for the overall performance of the AV provider's service, the AV provider's employees are the only ones which take direction from, and provide service to, the customer in renting the AV equipment and providing related AV services. Therefore, the Petitioner is not purchasing either the equipment rental or the AV services from the AV provider, and the Petitioner is not selling such services as a component part of its catering services.

The Petitioner does, however, frequently collect the revenue owed to it and the AV provider through the use of the "master billing" account. While the hotel and the AV provider are separate, unrelated entities, the hotel does receive a considerable commission in exchange for allowing the AV provider to act as the sole on-site provider of the AV equipment and related AV Services. While a customer is free to bring in their own equipment or AV provider, they generally will also have to pay a member of the AV provider's staff to be present as well.

The contract between the Petitioner and the AV provider acknowledges that the manner in which the AV provider delivers its services will reflect upon the hotel. For this reason, the provisions of the contract provide that the AV provider operate within a number of detailed guidelines. For example, the hotel has the right to establish rules relating to the appearance and conduct of the AV provider's employees. The contract not only details the staffing levels expected of the AV provider, but also provides detailed lists of the type (and amount) of equipment to be located at the hotel.

These provisions illustrate the shared interest between the hotel and the AV provider. While other AV providers may be used by the customer, the hotel has a contractual obligation and significant financial interest in acting on the AV provider's behalf. Moreover, the hotel often collects the receipts received on the AV provider's behalf. As a result, we conclude that the hotel and the AV provider are co-vendors for the purposes of the Tax Law. *See Names in The News v. New York State Tax Commn*, (75 AD2d 145 (3d Dep't 1980); *Matter of Edward Yager and Patrick McKeon d/b/a California Brew Haus*, TAT (March 23, 1989). As such, the hotel is jointly and severally liable for any sales tax due on the sales of AV service contracts if it collects the receipts and then turns those receipts over to the AV provider, and the AV provider subsequently fails to remit the tax due on such sales. *See, Jericho Boats of Smithtown, Inc. v. State Tax Commission*, (144 AD2d 163 (3d Dep't 1988); Sec. 1101(b)(8)(ii)(A) Tax Law. Accordingly, the hotel will be liable for tax if the AV provider fails to remit it to the Department. Similarly, in cases where the hotel collects the receipts on the AV provider's behalf and remits the sales tax itself, the AV provider is jointly and severally liable for any sales tax due on the sales of AV service contracts if the hotel fails to remit the tax due on such sales. However, the hotel is not required to remit tax on the sales if the AV provider has reported and remitted the tax due nor is the AV provider required to remit tax on the sales if the hotel has reported and remitted the tax due. *See Old Republic Minnehoma Insurance Co. and Ordesco, Inc.*, TSB-A-02(16)S. Both the hotel and the AV provider must be able to substantiate, in every instance, how and when tax received from its co-vendor was remitted to the department.

DATED: October 15, 2012

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.