

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

TSB-A-02(34)S
Sales Tax
July 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010330A

On March 30, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Little Chefs, Ltd., 33 Jackson Avenue, Syosset, NY 11791. Petitioner, Little Chefs, Ltd., provided additional information pertaining to the Petition on April 6, 2001.

The issue raised by Petitioner is whether it is required to register as a vendor and collect sales tax on receipts from its birthday party baking classes, which include both the cost of the baking class and the cost of food and/or beverages also provided.

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

Petitioner was initially formed to teach measurement to young children through a series of baking/cooking classes. Recently, the concept was expanded to offer its services in a “private birthday party baking class” environment, on Petitioner’s premises, which involves the following activities.

The parent selects a baking product, i.e., cookie, pretzel, etc., to be made by the children at the party. Baking this product is the substantive element of the party. The children measure, mix, roll, and assemble the product to be baked. The product is placed on a tray to be baked. Once baked, the product is placed in a box for each child to take home. Petitioner’s building plans and permits require the premises to be constructed in a manner to accommodate these activities.

While the cookies, pretzels, etc. are baking, Petitioner serves snacks, food and/or beverages to the children based upon the package selected by the parent. Petitioner does not cook or prepare this food, but purchases items such as heros, pizza, juice, and soda from local merchants (and pays New York State sales tax, where applicable).

Petitioner charges a flat fee for 15 children based on the types of items to be included in the private party baking class. An additional per child fee is charged for every child over the agreed upon 15 children minimum. A portion of the flat fee represents a portion of Petitioner’s cost for the food.

Applicable Law and Regulations

Section 1101(b)(8)(i) of the Tax Law defines the term “vendor,” in relevant part, as:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article. . . .

Section 1105 of the Tax Law imposes sales tax, in part, on:

(a) 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 sales tax upon receipts from the sales, except sales 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. . . .

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form. The food and drink excluded from the exemption provided by this paragraph under subparagraphs (i), (ii) and (iii) of this paragraph shall be exempt under this paragraph when sold for seventy-five cents or less through any vending machine activated by the use of coin, currency, credit card or debit card. With the exception of the provision in this paragraph providing for an exemption for certain food or drink sold for seventy-five cents or less through vending machines, nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

Section 1131(1) of the Tax Law defines “[p]ersons required to collect tax,” in part, as “every vendor of tangible personal property or services”

Section 1134(a)(1) of the Tax Law provides, in part:

(i) Every person required to collect any tax imposed by this article ... shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business

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

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.

Example: A vendor sells a package containing assorted cheeses, a cheese board and a knife for \$15. He is required to collect tax on \$15.

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

(a) *Imposition.* Sales tax is imposed on the receipts, including any cover, minimum, entertainment or other charge, from every sale of . . . food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers:

(1) in all instances where the sale is for consumption on the premises where sold. . . .

* * *

(c) *Premises.* The term *premises* shall mean the total space and facilities in or on which the vendor conducts his business, including but not limited to . . . counter space, indoor or outdoor tables, chairs, benches and similar conveniences.

(d) *Consumption on premises.* The phrase *for consumption on the premises* shall mean that the food or drink sold may be consumed on the premises where the vendor conducts his business.

* * *

(f) *Caterers.* (1) Sales by caterers.

(i) All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable.

* * *

(2)(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.

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).

* * *

(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.)

Opinion

Petitioner is a host to parties that include both instructional baking activities and the provision of snacks, food, and/or beverages for one set price. At the party, the primary focus is the baking activity. During baking, items such as pizza and soda are served. All food and beverages served are purchased from outside establishments. No preparation is done on the premises.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services. Baking instruction is not deemed to be the sale of any of the services enumerated under Section 1105(c). Therefore, providing baking instruction alone would not be subject to sales tax. However, the sale of food and drink by Petitioner for consumption on its premises falls within the purview of Section 1105(d)(i)(1) of the Tax Law and sales tax must be collected on such sales. See Section 527.8(a)(1) of the Sales and Use Tax Regulations.

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Pursuant to Section 1105(d)(i)(1) of the Tax Law, all charges for food and drink sold in or by restaurants, taverns or other establishments where the sale is for consumption on the premises where sold are subject to tax, including any cover, minimum, entertainment or other charge made to customers. Further, when tangible personal property and/or services composed of taxable and exempt items is sold as a single unit, tax must be collected on the total price. See Paul J. Carucci, Adv Op Comm T&F, October 24, 1990, TSB-A-90(54)S. Petitioner's birthday party package is being sold as a single unit, i.e., a base amount for the first 15 children and additional "per child" fees, and the package consists of taxable and exempt items. Under the facts of this Advisory Opinion, the entire receipt from the sale of the birthday party package is subject to sales tax. Since Petitioner is making taxable sales, it is a vendor and must register with the Department of Taxation and Finance for the collection of sales tax. See Sections 1101(b)(8)(i)(A) and 1134 of the Tax Law.

Petitioner's purchases of items that are not exempt from sales tax under Section 1115(a)(1) of the Tax Law, such as soda and ice for serving in drinks, may be made for resale and, therefore, not be subject to sales tax. See Section 527.8(f)(2)(ii) of the Sales and Use Tax Regulations. However, Petitioner's purchases of food or drink taxable under Section 1105(d) of the Tax Law, such as heros and pizza, may not be purchased "for resale" and are subject to tax. Petitioner may, however, take a credit on its sales tax return for the sales tax it paid on such purchases of food and drink. See Section 527.8(f)(2)(iv) of the Sales and Use Tax Regulations. Petitioner is not required to pay sales tax on purchases of items such as frozen pizza and milk that are exempt from sales tax under Section 1115(a)(1) of the Tax Law.

DATED: July 25, 2002

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