

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

TSB-A-02(35)S
Sales Tax
July 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010626A

On June 26, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Kaufman & Serota, P.C., 225 Broadway, Suite 1902, New York, New York 10007. Petitioner, Kaufman & Serota, P.C., provided additional information with respect to the Petition on September 10, 2001.

The issue raised by Petitioner is whether the amount charged by Petitioner's client for providing labor to prepare hot meals at a day camp is subject to sales and compensating use tax, under the circumstances presented.

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

Petitioner's client (Client) is a corporation. Client is engaged by a day camp to provide labor in the preparation of hot and cold meals. Client does not operate a restaurant and does not prepare food for the general public or other venues like nursing homes, airlines, colleges, etc. The arrangement with the day camp is an oral agreement and compensation is based on the camp population. Fluctuations in daily attendance of the campers do not impact the compensation paid to Client.

Client prepares the meals at the camp. The camp is responsible for determining the menu, purchasing the groceries, providing the equipment and supplies to prepare the food and determining when the meals will be served. Client may suggest typical foods campers will eat and the quantities of various ingredients needed to complete the menu. The camp is billed by and pays a third party for the groceries. Client has no affiliation with the third party grocer. The camp is also responsible for serving the food and any cleanup of the eating area. Client is responsible only for the kitchen operations. With regard to the staff preparing the meals, Client hires and fires the staff, pays the wages, and supervises the staff at the camp's location.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) 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), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax....

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

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.

* * *

(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

Section 1105(c) of the Tax Law imposes the sales tax upon the receipts from the sale of certain enumerated services.

Section 1115(a) of the Tax Law provides, in part:

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 confectionary, (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 . . . nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

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

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.

(ii) Sales of food or drink by caterers where the caterers merely deliver the items purchased and offer no other services after delivery are deemed to be sales for off-premises consumption and are taxable in accordance with the provisions of subdivision (a) of this section.

(iii) Sales of food or drink by caterers where the caterers deliver the items purchased and arrange the food on platters or place the drink in containers so that food or drink is ready to serve guests are taxable.

Opinion

Client's services are limited to cooking meals at the day camp. The camp is responsible for determining the menu and providing the groceries, equipment and supplies. The camp is billed by and pays a third party for all groceries. Client has no affiliation with the third party grocer. The camp is responsible for serving the food to its campers as well as the clean-up of the eating area. Since there is no sale of food, drink or other tangible personal property, or other services, Client is not selling food or drink or providing a catering service within the meaning and intent of Section 1105(d) of the Tax Law and Section 527.8(f) of the Sales and Use Tax Regulations. Furthermore, the cooking service provided by Client, taken by itself, is not one of the services enumerated as

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taxable under Section 1105(c) of the Tax Law. See Jacqueline Holtzman, Adv Op Comm T&F, April 17, 2001, TSB-A-01(12)S. Accordingly, Client's charges to the day camp for such cooking service are not subject to sales and use tax.

DATED: July 25, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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