

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

TSB-A-09(22)S
Sales Tax
May 27, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090120B

Petitioner [REDACTED], requested an advisory opinion as to whether its separate charges for providing a personal shopping service and its separate additional charges for home delivery service are subject to the sales and use tax. We conclude that Petitioner's charges for personal shopping service are not subject to the sales and use tax but that its charges for home delivery service are subject to sales and use tax if the customer has purchased any taxable property or services.

Facts

Petitioner is a cooperative that operates numerous supermarkets in the United States, including supermarkets located in the state of New York. Petitioner is operated by its members and references to Petitioner also refer to its members. Petitioner predominantly sells exempt food items at its supermarkets.

Petitioner offers personal shopping services to its customers. Customers place their shopping order online via Petitioner's website to request the assistance of a personal shopper. Via the website, customers select the items to be purchased. In addition to selecting their purchases, customers may add comments (e.g., extra lean turkey, ripe bananas, etc.) to their order, which allows personal shoppers to best meet the customers' needs. If a customer has questions related to the order, the customer may call Petitioner and speak directly with the personal shopper.

The personal shopper shops for the groceries based upon the customer's personal shopping list. When the groceries are ready for pick-up, the customer drives in to Petitioner's designated parking area and the personal shopper loads the groceries into the customer's vehicle. Alternatively, customers may elect to have their groceries delivered by Petitioner directly to their homes. Petitioner charges customers choosing to have their purchases delivered directly to their homes a separate delivery fee.

Customers may pay for their orders in the same way as if they had shopped in the store themselves. Petitioner accepts cash, checks, credit cards, debit cards and gift cards in payment for the goods purchased and the shopping and delivery services. The personal shoppers are employees of Petitioner and receive payments for their performance of shopping services from Petitioner as employees of Petitioner. Petitioner charges customers the same prices for their purchases assembled by personal shoppers as the customers would be charged if the customers shopped for the groceries at the supermarket themselves. Petitioner charges customers a separate personal shopping service fee. This is a standard fixed fee which neither depends upon nor fluctuates based on the cost or number of items purchased.

Analysis

As presented for the purposes of this Opinion, Petitioner's customers have the option of shopping for groceries by themselves without resort to the services of Petitioner's personal shoppers. The customers doing their own shopping and those using the personal shopping services of Petitioner's employees pay the same price for the same groceries and goods. Thus, it appears that the personal

shopping service offered by Petitioner to its customers is a separately identifiable, optional, and separately contracted service.

The fees for the personal shopping service, as described in this Opinion, are charges for a service separate and distinct from the charges to a customer for the tangible personal property and services taxed under Tax Law § 1105(d) (e.g., heated meals, catering, etc.) that are purchased at the supermarket. While all tangible personal property is subject to tax under Tax Law §1105(a) (unless otherwise exempted); only the specifically enumerated services in Tax Law §1105 are subject to tax. Petitioner's personal shopping service is not among the enumerated services subject to sales or use tax. Thus, Petitioner's separate charge for the performance of the shopping service with respect to groceries and other items and services picked up by customers at Petitioner's supermarkets is not taxable. See *Paul Lorenzo*, Adv Op Comm T & F, September 28, 1994, TSB-A-94(46)S.

This Opinion presumes that Petitioner's shopping service is being performed at the same supermarket locations where customers may themselves individually shop for their groceries and thereby avoid Petitioner's charges for the services of the personal shoppers in assembling customer orders. If Petitioner operated as a catalog warehouse where customers could not individually shop and assemble their own purchases and Petitioner's charges for purchases from such location always included its operational expenses of assembling and packaging the customer orders, the whole charge for the property purchased, including the expense of picking and packaging a customer's order, would be considered the receipt for sales tax purposes. See Tax Law §1101(b)(3).

Petitioner's charge for its shopping service is considered part of the receipt for sales tax purposes if groceries are delivered by Petitioner to the customer's home. Section 1101(b)(3) of the Tax Law provides that the receipt is the amount of the sale price of any property and the charge for any taxable service and includes charges by the vendor to the purchaser for shipping and delivery. Accordingly, if Petitioner provides home delivery service for grocery items, the receipt includes the cost of the grocery items and the delivery fee. In the case of home delivery, Petitioner must first assemble and package the customer's order before it can deliver the groceries to the customer. Thus, in the case of home delivery, the personal shopping service constitutes an integral aspect of the home delivery that cannot reasonably be reckoned a separate service arising from a different transaction. See *Penfold v State Tax Commission*, 114 AD2d 696 (1985) (determining that the cost for the disposal of refuse was an inseparable element of the integrated service of picking up and delivering trash to the dump). Therefore, Petitioner's receipt for home delivery of the groceries is the sum total of Petitioner's charges for the groceries, assembling, packaging, and transportation, regardless of whether the charges are separately stated on the bill and invoice.

Petitioner's customers may be purchasing a mix of taxable items (e.g., soda, candy, paper goods, detergent, etc.) or services taxed under Tax Law §1105(d) (e.g., heated meals) and exempt items (e.g., food, juice, etc) from Petitioner. Technical Services Bureau Memorandum - *Delivery Charge Added To Taxable Receipt Effective September 1, 1991*, dated January 13, 1992, TSB-M-92(2), provides:

When separate charges for the taxable and nontaxable sales are made, sales tax is not to be collected on the nontaxable portion. If both taxable and nontaxable sales are separately listed on one bill, but only one charge for delivery is made, the entire delivery charge becomes part of the taxable portion of the receipt and therefore, subject to tax.

Thus, if any taxable property or service is included in the order delivered, the fee charged for home delivery is part of the receipts subject to tax in its entirety. In this situation, Petitioner should collect

appropriate tax on the charges for the home delivery, assembling, and packaging, and the taxable groceries and services, but would not collect tax on the separate charges for the purchase of exempt food items. If none of the groceries and other items purchased by a customer is subject to sales tax, then the receipts for the property, including the charges for home delivery, assembly, packaging, and transportation are not subject to sales tax. If all of the items sold to a customer are taxable, then the total receipts from the sale are subject to sales tax.

DATED: May 27, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.