

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

TSB-A-10(15)S
Sales Tax
April 8, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S091217A

Petitioner, [REDACTED] which has a contract with a public college to provide meals to the college's students pursuant to a student meal plan offered by the college, asks whether its payments to a third party for meals provided to students temporarily lodged by the college in off-campus housing are subject to sales tax.

We conclude that Petitioner's purchases of meals provided by the off-campus third party provider are subject to sales tax, but Petitioner is eligible for a refund or credit of the tax paid.

Facts

Petitioner provides food and facilities management services to institutions. In particular, Petitioner provides food services to educational institutions including colleges and universities. Contracts between Petitioner and the college or university generally provide for student meals and cafeteria services.

Petitioner manages the food service operations at a public college in New York State. Under the terms of the contract, Petitioner provides meals to students who participate in the college's meal plan programs at cafeterias on the college's campus. The meal plans are billed to the students by the college.

Petitioner does not charge sales tax on the meals provided to the students on campus pursuant to its contract with the college.

Enrollment at the college increased to a point beyond the physical capacity of the college to house all the students who desired on-campus housing. To provide for the overflow, the college has arranged for a private hotel in the area to temporarily house some students until space becomes available to provide on campus housing for the students. The agreement is between the college and the hotel and the college compensates the hotel for the rooms occupied.

The hotel also provides meals to the students pursuant to the meal plan program of the college. Petitioner is invoiced by the hotel for the cost of the meals, including sales tax. The hotel bills Petitioner for the specific number of meals it provides the students. Petitioner recoups its expenses for these meals as part of its contract with the college to provide meals to students participating in the college meal plan.

The students temporarily housed at the hotel who participate in the college's meal program, when eating breakfast at the hotel, participate in the hotel's continental breakfast along with the hotel's other guests. For other meals, a specific area of the hotel's dining room has been set aside for the student's use. There is a specific *student* menu for these meals. The meals provided are comparable

to the meals provided in the on-campus facilities by Petitioner. Students at the hotel evidence their entitlement to receive food pursuant to the college meal program by swiping their meal card; this is the same process they would use if they were receiving food pursuant to the college meal program at the on-campus cafeterias. The meal card used by the students at the hotel is the same as is used on-campus and the students may use their cards to obtain meals on-campus. However, students not temporarily housed in the hotel are not authorized to use their meal cards to obtain food at the student area of the hotel's dining facility.

Analysis

Sales tax is imposed on sales of food and drink when sold in or by restaurants, taverns or other establishments and by caterers. (*See* Tax Law Section 1105(d).) An exclusion from the tax applies to food or drink (excluding alcoholic beverages) sold at a restaurant, tavern or other establishment located on the premises of a college or university to a student enrolled therein under a contractual arrangement whereby the student does not pay cash at the time he or she is served. (*See* Tax Law Section 1105(d)(ii)(B).)

The students at issue here contracted with the college for room (lodging) and board (meal plan). Their meal plan entitles them to receive food and drink at facilities located on the college premises the same as all other students enrolled in the meal program. Due to oversubscription to on campus housing, the college has made temporary arrangements to house the students at a local hotel. Payments by these students to the college for their participation in the college meal program are excluded from the sales tax to the extent the college's plan, and the receipts paid therefor otherwise qualify for the exclusion pursuant to the provisions of section 1105(d)(ii)(B) of the Tax Law. Petitioner, pursuant to its contract with the college to provide meals to students under the college's meal plan program, has made arrangements for these students to receive meals at the hotel when the students have not otherwise availed themselves of the opportunity under the meal plan to receive meals at on-campus facilities.

The exclusion from sales tax in Tax Law section 1105(d)(ii)(B) applies to sales of food or drink made to students. In the present case, Petitioner is making purchases from the hotel of food and drink that are served to the students. Accordingly, the payments by Petitioner to the hotel for Petitioner's purchase of food and drink are subject to the tax imposed pursuant to section 1105(d) of the Tax Law.

Section 1105(d) of the Tax Law does not provide for an exclusion from tax for sales of food and drink for resale. Thus, in general, all receipts from the sale of food and drink are subject to sales tax. However, if food and drink are purchased for resale, 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 food and drink Petitioner is purchasing from the hotel are being provided to the students pursuant to the students' participation in the college's meal plan program and Petitioner's obligations under its contract with the school to provide meals to the participating students. Accordingly, Petitioner may take a refund or credit on its sales tax return for the tax it pays to the hotel on such prepared food and drink. *See UM Enterprises Ltd, Adv Op Comm T&F, March 24, 1998, TSB-A-98(21)S and Klondike*

Cruises, Inc, Adv Op Comm T&F, July 29 1998 ,TSB-A-98(46)S. *See also* Sales and Use Tax Regulations section 527.8(i).

DATED: April 8, 2010

_____/S/
Jonathan Pessen
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