

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

TSB-A-11(27)S
Sales Tax
October 17, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NOs. S100209B
& S100209C

The Petitioners are the owners of two hotels [REDACTED] that have each entered into a contract with a third party to rent audio visual equipment and provide related services (AV provider) at their respective hotel locations to the hotel's guests and customers. The AV provider enters into a separate agreement with the customer to rent audio visual equipment and related services for a specific event at the hotel (AV services). The Petitioners ask: (1) are they purchasing AV services from the AV provider; and (2) whether they would be treated as the vendor of such AV services by the AV provider at their hotel locations.

We conclude that in those instances where the AV provider enters into a separate agreement between itself and the hotel guests or customers for providing AV services at a specific event, the hotels are not purchasing the AV services from the AV provider. However, due to the nature of the contracts at issue, they may be considered to be acting as co-vendor in any instance where they collect the payment from the customer and that payment includes taxable receipts.

Facts

The Petitioners each own a hotel located within New York State. Each hotel location 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 hotels will offer their customers various services including guest rooms, food and drink, and other items related to the events themselves, such as charges for renting a ballroom or meeting room. The hotels do not own the AV equipment and their staff do not provide AV services to their customers. Each of the hotels has entered into a separate 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 that location for the benefit of the hotel and its customers. The contracts also provide that the AV provider will act as an independent contractor with its own employees, and will operate from a designated location within the hotel at issue. In return, the AV provider agrees to execute its services to the hotel's customers in the manner expected by the hotel, and to pay the hotel a sizable commission (generally 40% and up) from the proceeds of its equipment rentals and AV services. The contract does require the AV provider to cooperate and coordinate with an outside AV provider if one is selected by the hotel guest.

When scheduling an event, each 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 insist that the AV provider provide AV services to the customer. In order to obtain AV services at its event, the customer is required to enter into a separate contract with the AV provider.

Depending on the services to be provided to the client, the hotel may collect the entire fee for the event, including the amounts for the AV services, from the customer. 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 onsite AV provider. While any hotel customer is free to bring in their own outside contractor to provide AV equipment and related services, if a customer elects to do so, they and the outside AV provider must follow certain guidelines. A typical invoice provided to the customer will include separate charges for equipment rental, rigging equipment rental, labor, and setup/take down charges.

While the hotels' contracts with the AV provider provide that the AV provider operates as an independent contractor, the contracts acknowledge 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 contracts require that the AV provider operate within a number of detailed guidelines. For example, the AV provider is required to collect customer service scores from its customers at the time events are held at the hotel. If the survey responses fall below the hotel's expectations (as stated in the contract), there are negative consequences for the AV provider. If the customer service scores drop below a certain average as required by the contract, the hotel may increase the amount of commission payable to it pursuant to its contract with the AV provider as a form of penalty. In this instance, this amount is not refunded or credited to any customer of the hotel. Moreover, the hotel reserves to itself the right to ask the AV provider to offer its equipment and services at discounted prices to those customers selected by the hotel (such as for frequent hotel customers), or to provide refunds or accept less than the billed amount if a customer is particularly dissatisfied. The contract even provides that the AV provider is required to render its services and equipment to the hotel at no charge when for use at the hotel's own events (such as staff meetings, or training classes). However, the AV provider otherwise sets the base prices for the rental of its equipment and any related labor charges, subject to the hotel's approval. These base prices must be consistent with the AV provider's prevailing published rates for the rental of comparable equipment at comparable hotels and resorts in which the hotels compete.

The contract between the hotel and the AV provider also grants the hotel the ability to establish general guidelines for the provision of AV provider's services. For example, the hotel has the right to establish rules and regulations relating to the appearance and conduct of the AV

provider's employees, and may require the AV provider to remove any employee of the AV provider whose manner or dress the hotel finds objectionable. 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. The hotel also has the ability to audit both the performance of the AV provider's services and its books.

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, in many cases the customer chooses 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. 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 services generated by the 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 AV provider, not to the hotel. Pursuant to the contract between the hotels 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 §1101(b)(4)(i)(A), a sale of such property for use in performing certain enumerated services is not considered to be a retail sale and is not, therefore, subject to tax. Catering services, which are taxable under Tax Law §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 Petitioners 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 Petitioners would be subject to tax. *See Matter of 21 Club, Inc. v. Tax Appeals Tribunal*, 69 A.D.3d 996 (3d Dep't. 2010).

Unlike the caterer in *21 Club*, neither Petitioner enters into a contract for the rental of the AV equipment to its customers. The Petitioners' agreements with their 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 Petitioners may establish very 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 related AV services. Therefore, Petitioners are not purchasing either the equipment rental or the AV services from the AV provider, and the Petitioners are not selling such services as a component part of its catering services.

The Petitioners do, however, frequently collect the revenue owed to them and the AV provider through the use of the "master billing" account. While the hotels and the AV provider are separate, unrelated entities, the hotels at issue do receive a considerable commission in exchange for their agreeing to the AV provider as the sole in-house/on-site provider of the AV equipment and related AV Services at the hotel, and the hotels agree that they shall not operate their own audiovisual equipment rental services business, or enter into an agreement or contract for the provision of AV services at the hotel other than through the AV provider. 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 (which would discourage most customers from doing so). Certainly, in most instances, when a customer asks for AV services the hotel refers them to the AV provider, as the hotel will ultimately end up receiving a considerable commission.

Because the rental of the AV equipment and the provision of the related AV services are critical to the hotels' operations, the contracts acknowledge that the manner in which the AV provider delivers its services will reflect upon each 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 and regulations relating to the appearance and conduct of the AV provider's employees and may require the AV provider to remove any employee of the AV provider whose manner or dress the hotel finds objectionable. 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. The hotel also has the ability to audit both the performance of the AV provider's service and its books. The latter provision is to protect the hotel in those instances where the AV provider receives payment from the customer directly.

These provisions, among many others, illustrate the shared interest between the hotel and the AV provider. While other AV providers may be used by the customer if the customer insists on it, the hotels have a contractual obligation and significant financial interest in acting on the AV provider's behalf in "directing" general AV inquiries from its customers to the AV provider. That, along with the fact the hotels often collect the receipts received on the AV provider's behalf, means 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 A.D.2d 145); *Matter of Edward Yager and Patrick McKeon d/b/a California Brew Haus*, TAT (March 23, 1989). As such, the hotels are jointly and severally liable for any sales tax due on the sales of AV service contracts if they collect the receipts and then turn such 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); Sec. 1101(b)(8)(ii)(A) Tax Law. This means that the hotels will be liable for tax if the AV provider fails to remit it to the Department. However, the hotels are not required to remit tax on the sales if the AV provider has reported and remitted the tax due. *See, Old Republic Minnehoma Insurance Co. and Ordesco, Inc.*, TSB-A-02(16)S.

This AO is based upon the terms of the contracts provided; the analysis may change if the contract terms change.

DATED: October 17, 2011

/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.