

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

TSB-A-14(27)S  
Sales Tax  
August 20, 2014

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110331A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether it is a vendor selling food products subject to sales tax under Tax Law §1105(d) and whether its charges to its clients are subject to sales tax.

We conclude that Petitioner is not a vendor for purposes of Tax Law § 1101(b)(8) and cannot be designated as a co-vendor on the restaurant sales. Petitioner's service fees billed to its clients are not subject to sales tax.

**Facts**

Petitioner operates a website through which approximately 5,000 restaurants in over 27 cities and two countries offer meals for sale. The website provides restaurants with a way for customers to order and pay for their meals. When a meal is ordered through the website, the payment submitted to the Petitioner by the customer includes sales tax. Petitioner remits all funds collected from the customer to the restaurant, less its marketing services fees. The selling restaurant is responsible for remitting any sales tax collected to the appropriate taxing authority. The selling restaurant is also responsible for delivery of the meals and maintains possession, control and care of all items being offered for sale on the Petitioner's web site.

Petitioner charges restaurants a one-time activation fee and a menu update fee. It also charges restaurants a fixed monthly marketing partnership fee, in exchange for which Petitioner will use commercially reasonable efforts to compile, write, and display general information about the restaurant.

Petitioner's web site allows searches to be made by restaurant name, food type or geographic area. Petitioner's website lists a menu for each restaurant with which Petitioner has a contractual relationship. The prices listed on these menus are the same as charged on the restaurant's own take out menu. Each restaurant determines its own minimum delivery amount.

A customer places his or her order through Petitioner's website. Petitioner instantaneously routes the order electronically to the restaurant selected by the customer. The restaurant then sends the customer an email that contains a confirmation number and includes contact information for the restaurant. The confirming email will also list the details of the order, the total price and tax for the meal order, and an estimated delivery time. Customer must send cancellation notices for orders directly to the restaurant. Petitioner's web site states that, if a customer has any problems with the food or delivery, "the best thing to do is to contact the restaurant directly." Customers pay Petitioner for the restaurant meals by credit card.

## Analysis

Section 1105(d) of the Tax Law, in part, imposes sales tax on the following:

(i) The receipts 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 ....

Petitioner is not operating a restaurant or similar establishment. Nor is it providing catering services for purposes of Tax Law § 1105(d). Petitioner's activities constitute the combination of the provision of Internet advertising services and fulfillment services to the restaurants. *See* Tax Law §§ 1101(b)(8)(v)(A), (18). These activities do not make Petitioner the vendor of the restaurant sales for purposes of New York sales tax. *See* TSB-A-99(49)S. Further, because the Petitioner is providing fulfillment services, it cannot be treated as a co-vendor, jointly responsible with the restaurants for the collection of sales tax. *See* Tax Law § 1101(b)(8)(ii)(A). However, if Petitioner fails to remit to a restaurant the full New York sales tax that Petitioner collected on behalf of the restaurant, the Commissioner reserves the right to collect those funds from Petitioner under the doctrine of money had and received. *See City of New York v. Advance Trading Corp.*, 202 Misc. 208 (1952); *Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008.

Petitioner's charges to the restaurants are for services that are not subject to sales tax. Therefore, Petitioner is not required to collect sales tax on these charges.

DATED: August 20, 2014

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DEBORAH R. LIEBMAN  
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.