

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

TSB-A-14(34)S  
Sales Tax  
August 27, 2014

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120828B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether charges by a subsidiary (“Sub”) of Petitioner for certain food preparation services provided by “worksite employees” to a third party are subject to the sales and use tax when the employees providing such services are employed by both the Sub and the third party (“Client”). Petitioner also asks if it may use a resale certificate when it purchases certain food, and food related items, that will be subject to tax when sold to a client.

We conclude that charges by the Sub to a Client for food preparation services provided by the Sub’s employees are not subject to sales tax, provided that the Sub is not dominated and controlled by Petitioner, or their activities are not so intertwined that they would be considered to be operating as alter egos of each other. Moreover, Petitioner may not either be engaged in the supervision of the cooking or serving of the food, or make the arrangements for the provision of such services with any Client on Sub’s behalf. Petitioner must collect tax on any taxable sales of food or food related items that it sells to any Client located in New York. In such instances, Petitioner may use a resale certificate when it purchases the food and food related items it sells without use or alteration prior to its sale to the Client.

**Facts**

Petitioner provides various food preparation services. It also provides certain administrative services, where it assists a Client in the procurement and purchase of food and related supplies. These services are provided primarily to Client nursing facilities and senior citizen independent housing communities.

Petitioner is considering a business structure in which the food preparation services at a particular location would be performed by employees jointly employed by the Client and a Professional Employer Organization (“PEO”). Petitioner would form an LLC (the Sub) that it would directly control. The Sub would be qualified to do business as a foreign entity in the State of New York, and the Sub would be registered with the New York State Labor Department as a PEO, as that term is defined by Labor Law § 916(4).

Under the proposed business structure, Petitioner’s primary business activities in New York would be limited to providing its administrative services to and procuring and purchasing food and related supplies for a Client that Sub has also contracted with to provide certain food preparation services. For the purpose of the division of tasks between the Petitioner and Sub, “food preparation” encompasses tasks provided by the Sub’s worksite employees to the Client, including general menu planning, inventorying food and related supplies on hand, preparing lists of food and related supplies

to be purchased by Petitioner, preparing food, cooking meals, serving prepared food, cleaning used dishes and utensils used in the preparation of the meals, and cleaning and sanitizing kitchen equipment at the Client's location. Petitioner's service of procuring and purchasing food and related supplies will include selecting distributors and other vendors, based on the lists of food and related supplies provided by the Sub's worksite employees and input from dietitians, placing orders for food and supplies and making payment for those orders. Such service will not include the handling of food or supplies or the storage or preparation of food and supplies.

Petitioner also would provide administrative services to Sub, consistent with the corporate services required to support a subsidiary. However, Petitioner will not provide supervision or any on-site management of Sub's worksite employees, and no one will do so on behalf of Petitioner or any other entity related to Petitioner. Daily on-site supervision will be the responsibility of the Client and the Sub. Also, under no circumstances would any clients contract with, or make arrangements for, Sub's services through Petitioner. Petitioner would not advertise Sub's services or otherwise promote their availability. The Sub will bill the Client directly for the food preparation services provided by the worksite employees. Client will also reimburse Sub for the employee's wages. Sub does not charge Petitioner for the employee wages, and Petitioner does not charge the Client for such amounts.

The Client also may engage Petitioner, as an independent contractor at prevailing rates, to provide Client with general administrative services where Petitioner procures food and related supplies. These services are billed by the Petitioner directly to the Client. These administrative services do not include the on-site management of either the food preparation services provided by Sub or the employees of the Sub or Client. Petitioner does not act as the agent of the Client when making purchases from the food distributors and other vendors. It is expected that Petitioner will mark-up its cost of these items to cover Petitioner's general and administrative costs and to provide for a reasonable profit. The food distributors and other vendors will issue invoices for the food and related supplies to Petitioner and Petitioner will make payments for such invoices directly to the food distributors and other vendors.

Petitioner is registered for sales tax purposes and has a valid Sales Tax Certificate of Authority. When making purchases of taxable items that are intended to be resold to the Clients, Petitioner will present to the food distributor or other vendor a *Resale Certificate* (Form ST-120), signed by Petitioner and setting forth Petitioner's name, address and Certificate of Authority number.

Petitioner will collect and remit sales taxes from its Clients when selling food and related supplies to the Clients that are subject to sales tax. However, Petitioner will not collect tax if presented with a completed *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1) or other valid exemption document.

Petitioner and Sub will operate as distinct legal entities. Each will enter into separate contracts with the Client and will invoice the Client separately for their respective goods and services. Each entity has its own bank accounts, financial statements (which will be consolidated, together with other controlled entities, and reflected in the consolidated financial statements of Petitioner) and employees. Every Sub employee performing services in New York State will be a PEO "worksite employee," thus having an employment relationship with both Sub and the Client. The worksite employees would work only for one client at any point in time.

Sub would bear the cost of any administrative services provided to it by Petitioner (such as accounting, external audits or legal services). This means that the administrative services provided to Sub by Petitioner are charged at the prevailing rates for such services, which normally include a mark-up similar to what a third-party provider of such services charges. These charges will be made either through an intercompany charge or through a direct invoice. As a registered PEO, Sub would be subject to specific PEO reporting requirements required by the Labor Law, as well as reporting required by its contract with the Client (including reporting payroll tax liabilities as allowed by the provisions of the New York Professional Employer Act). *See* Article 31 of the Labor Law. Petitioner and Sub would conduct business under their own names and hold themselves out to the public as separate and distinct businesses.

### **Analysis**

Petitioner asks whether the Sub's charges to a Client for the "food preparation" services that are provided by the worksite employees are subject to sales tax. Sub's "food preparation" services include some services, such as menu planning, which are not enumerated services subject to tax under Tax Law § 1105(c). However, the "food preparation services" provided by the Sub include the services of preparing and serving food for the Client which, if combined with the purchase and sale of food, generally would be subject to tax pursuant to Tax Law § 1105(d). Section 1105(d) provides that:

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... 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.

There is no sales tax imposed upon "food preparation" services alone under Tax Law § 1105(c). Tax Law § 1105(d)(i)(2) imposes sales tax on every sale of food and drink, or of food alone, 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." Thus, under § 1105(d)(i)(2), if the food preparation services are combined with the sale of the food, or the food preparation services are arranged for by the vendor selling the food, the sales of the food would be taxable.

Petitioner and Sub operate as two separate legal entities. As such, under the arrangement as described by the Petitioner, the sale of the food has been separated from the food preparation services. Petitioner will enter into a separate contract with a Client and will purchase and deliver the food and related supplies to the Client. Petitioner will bill the Client separately for the food and related supplies. The Sub will enter into a separate contract with the Client for the food preparation and serving services and these services will solely be performed by Sub. Petitioner will not provide supervision or any on-site management of Sub's worksite employees, and no one will do so on behalf of Petitioner or any entity related to Petitioner. Daily on-site supervision will be the responsibility of the Client and the Sub. Petitioner does not advertise Sub's services, is not involved arranging for their availability, and

does not promote their availability. In such case, Petitioner will not be considered to be arranging for Sub's service on its own behalf for the purposes of Tax Law § 1105(d). Other than providing Petitioner a list of needed food items, Sub will not be involved with the purchasing of the food or the related supplies. Assuming this is true, we conclude that Petitioner will not be providing catering services pursuant to Tax Law § 1105(d) and will only be selling food items to the Client. *See* TSB-A-10(12)S.

If Petitioner either arranges for Sub's services to clients, or manages the provision of these services, the analysis under Tax Law § 1105(d) would change. *See* TSB-A-10(12)S. Moreover, if the activities of Sub were so dominated and controlled by Petitioner, or their activities were so intertwined that they would be considered to be operating as alter egos of each other rather than as separate legal entities, then the corporate structures would be disregarded and this analysis would no longer apply. *See* TSB-A-08(51)S; TSB-A-86(28)S.

Petitioner also asks if separately stated charges to a Client for food otherwise exempt from tax under Tax Law § 1115(a)(1) will be subject to tax. Petitioner anticipates collecting and remitting sales tax on any sale of taxable items, such as candy, soda and bottled water, sold to a Client, unless the Client is exempt from sales tax and presents a valid Exemption Certificate to Petitioner at the time of sale. However, to the extent these items will be subject to tax when sold to a Client, Petitioner asks if it may purchase these items using a resale certificate.

Since Petitioner is selling food and related supplies directly to the Client, Petitioner may provide its vendors with a properly completed *Resale Certificate* (Form ST-120) in order to relieve those vendors of their obligation to collect sales tax on their sales to Petitioner of items not exempt from tax pursuant to Tax Law § 1115(a)(1) that Petitioner purchases for resale "as such" to a Client. *See* Tax Law § 1101(b)(4)(i)(A).

DATED: August 27, 2014

/S/  
\_\_\_\_\_  
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.