

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [ REDACTED ] (“Petitioner”). Petitioner asks whether it is required to charge sales tax to customers on the site fee customers pay for use of its space as a special events venue. Petitioner also asks whether tax is due on Petitioner’s reimbursement payment to Caterer for all direct operating deficit costs and whether sales tax is due on Petitioner’s profit paid to Petitioner by Caterer for food and beverage services. We conclude that, when the venue is rented along with catering services, the site fee is subject to New York State sales and use tax because it constitutes a charge made in conjunction with the sale of food and drink. When the venue is rented without catering, the site fee is not subject to New York State sales and use tax. Additionally, we conclude that the reimbursement to Caterer of costs related to food and beverage preparation are taxable receipts from the sale of food and drink under Tax Law § 1105(d)(i), but the profit paid to Petitioner by Caterer is not subject to tax.

**Facts**

Petitioner owns a special events venue in Suffolk County, N.Y. It offers facilities for events and celebrations, including wedding receptions, private concerts, corporate forums, and other occasions. The property showcases a waterfront lawn, a private marina, an indoor ballroom, lounge, and views from the terrace.

The venue can be rented to customers with or without catering. Regardless of whether the customer requests catering, the customer pays Petitioner a site fee to rent the venue. However, if the customer would like to have the event catered, Petitioner requires that the customer contract with a specified Caterer. The site fee is nonrefundable, and the Petitioner determines the amount of the fee, depending on time of year and day of the week. Petitioner has a written agreement that Caterer will be the designated and exclusive food and beverage service provider for Petitioner. Caterer is a separate business entity from Petitioner with no related owners or officers. Caterer is responsible for collecting and remitting sales tax on the catering services and for filing its own sales tax returns. The customer negotiates and contracts separately with the Caterer, including paying the Caterer directly and separately from Petitioner’s site fee.

The agreement between Petitioner and Caterer states that, each month, the Petitioner will reimburse Caterer for:

All direct operating deficit costs including, but not limited to, payroll and benefits; food, liquor, and supplies, linen, laundry, and uniforms, insurance; licenses and permits; bank and credit card fees; phone, cable and related point-of-sale expenses; marketing material and seasonal decorations; recruitment/want-ads; office supplies and computer processing equipment; knife sharpening; smallwares; china and serviceware; repairs and maintenance unless damage caused by Dining Service Provider [Caterer]; equipment purchases, general and administrative costs; transition and start-up expenses, plus applicable tax, payable each month.

In addition, the agreement provides that, if Caterer makes a profit, the profit will be paid to Petitioner minus an agreed-upon fixed percentage. The agreed-upon percentage is the profit amount kept by the Caterer.

### **Analysis**

Petitioner first asks whether its site fee is subject to sales tax. Tax Law § 1105(d)(i) imposes sales tax on 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, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers.

If a venue is rented in conjunction with a catering service, the rental charge for the venue constitutes an “other charge” made to the customer and the entire receipt, including the rental charge, would be taxable. *See* TSB-A-03(20)S. However, a receipt for the rental of a room or another of the club’s facilities would not, by itself, be subject to sales tax. *See* TSB-A-17(5)S. When Petitioner rents its venue without catering, the site fee for that rental is not subject to sales tax. However, when catering is provided, the site fee is taxable. Here, Caterer is the exclusive provider of food and drink for events at Petitioner’s venue. In addition, the agreement between Petitioner and Caterer states that Petitioner reimburses Caterer for the costs of providing its food and beverage service for events at Petitioner’s venue. Under these circumstances, Petitioner’s site fee is a charge for the use of the venue in conjunction with the sale of food and drink. It is irrelevant to this conclusion that Petitioner and Caterer are unrelated entities. Therefore, the site fee when charged in conjunction with catering is subject to sales tax under Tax Law § 1105(d)(i).

Petitioner also asks whether sales tax is due on Petitioner’s reimbursement of Caterer’s costs relating to food and beverage service and, additionally, whether sales tax is due on the profit minus an agreed-upon percentage paid to Petitioner by Caterer. Reimbursed costs, subsidies and management fees for the provision of prepared food constitute taxable receipts for

the sale of food and drink within the meaning and intent of Tax Law § 1105(d)(i). *See Petition of Prophet Foods Company*, TSB-H-80(215)S; *see also, Stouffer Management Food Service, Inc. v. Tully*, 98 Misc.2d 1128, (Sup. Ct., N.Y. County, Nov. 15 1978). Therefore, Petitioner's reimbursement of Caterer's costs relating to food and beverage service are taxable under Tax Law § 1105(d)(i). However, profits paid to Petitioner by Caterer are not receipts from the sale of food and drink under Tax Law § 1105(d)(i) and are not subject to sales tax.

DATED: October 27, 2020

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