

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-81(50)S
Sales Tax
November 17, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810804A

On August 4, 1981 a Petition for Advisory Opinion was received from Gates Circle Realty Corp., 33 Gates Circle, Buffalo, New York 14209.

The issue raised is whether Petitioner is liable for payment of sales tax on rental charges for plates, cups, saucers, glassware, bowls, creamers, flatware and ash trays.

Petitioner, a caterer, provides catered meals at locations chosen by the customers. Plates, cups, saucers, glassware, bowls, creamers, flatware and ash trays are rented by Petitioner for use in conjunction with the serving of the catered meals. The cost of the rented tableware is factored into Petitioner's cost to arrive at the selling price of the meals. The customer is invoiced for the sale price of the meals served and is taxed on the total amount.

Petitioner contends that the rental items are components of the meal, along with the food and beverages served, and as such are transferred to the customer in the same form as they are acquired (i.e. rental). Inasmuch as the customer pays tax on the total charge for the meals served, Petitioner feels it should not be held liable for tax on the cost of these rental items included in the price of the meal and on which tax is collected from the customer.

Section 1105(d)(i) of Tax Law imposes a tax on: "The receipts from . . . every sale of food and drink of any nature or to 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 . . ."

The Sales and Use Tax Regulations state that: "All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery, are taxable. (Emphasis added) 20 NYCRR 527.8(f).

The term "purchase at retail" is defined in the Tax Law as "A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision." Tax Law §1101(b)(1). Section 1101(b)(4) of the Tax Law defines "retail sale" as "(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

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Petitioner acquires by rental the property at issue for use in providing a catering service pursuant to section 1105(d) of the Tax Law rather than for resale "as such or as a physical component part of tangible personal property" as prescribed in section 1101(b)(4)(i)(A). Further, since Petitioner's activities fall within the purview of section 1105(d), the provisions of section 1101(b)(4)(i)(B) are inapplicable.

Accordingly, Petitioner is liable for payment of sales tax on the rental of tableware for use in its catering activities as such rental constitutes a "purchase at retail" as defined in section 1101(b)(1). Additionally, Petitioner must collect tax on the total selling price to its customers for the catered meals which are prepared and served. Tax Law §1105(d) and 20 NYCRR 527.8(f).

DATED: October 29, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau