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

TSB-A-85(42)S
Sales Tax
September 9, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S841109C

On November 9, 1984 a Petition for Advisory Opinion was received from Tralfamadore Cafe, Inc., 701 Seneca Street, Buffalo, New York 14210.

The issue raised is whether the exception from the sales tax for admissions provided by Tax Law §1105(f)(1) for dramatic or musical arts performances applies to Petitioner's receipts from ticket sales to patrons (which amounts do not include charges for food or beverages), or whether such receipts represent charges of a roof garden, cabaret or other similar place, taxable under Section 1105(f)(3) of the Tax Law.

Petitioner operates an establishment for the entertainment of patrons by nationally known entertainers, vocalists, and bands on the second floor of 100 Theatre Place in downtown Buffalo. Among the entertainers who have appeared there are: Melba Moore, Kris Kristofferson, Phoebe Snow, Stan Getz, Peter Nero and the Tommy Dorsey Orchestra.

Petitioner describes its business operations as follows: The premises provide seats for 350 people at tables on three levels, allowing unobstructed view of the stage from every seat. There is permanent stage lighting and dressing rooms, a shower, and a sound and light room are located backstage.

Tickets are sold at a box office located on the same floor, or at Ticketron outlets throughout Western New York. Tickets can be ordered well in advance of a performance and reserved seating is available. Tickets, valid for one show only, carry the name of the entertainer and the date and time of the performance.

The cafe is open Tuesdays through Sundays. On some nights there may be two performances and each show is limited to about two hours. The cafe is closed on nights when no entertainer is booked. Doors open an hour before the first show and close 30 minutes after the last performance.

Petitioner states that advertisements of future performances at the box office and in local newspapers refers only to entertainers and not to the availability of food and beverages. However, it is noted that Petitioner holds itself out to be a "cafe" and that the common understanding of that term encompasses an establishment which serves food and beverages. A bar is located in the lobby of the cafe for the use of its patrons. Additionally, light snack food may be ordered by cafe patrons from the Tralfamadore Restaurant on the first floor of the building for consumption in the cafe during performances. Food purchase are optional and there is no minimum table charge. However, receipts from the sale of food and beverages are in excess of 45% of Petitioner's total receipts.

Petitioner emphasizes that the show is the only entertainment provided (there is no dancing), and that entertainment revenues consistently exceed sales of food and beverages. Petitioner states it has correctly reported all sales taxes due on sales of refreshments.

Section 1105(f)(1) of the Tax Law imposes sales tax on "Any admission charge ... to or for the use of any place of amusement in the state, except charges for admission to ... dramatic or musical arts performances ..."

Section 1101(d)(5) of the Tax Law defines "dramatic or musical arts admission charge" as: "Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

Section 1105(f)(3) of the Tax Law imposes a sales tax on:

"The amount paid as charges of a roof garden, cabaret or other similar place in the state."

Pursuant to section 1101(d)(4) of the Tax Law, the phrase "charge of a roof garden, cabaret or other similar place" means:

"Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place."

Section 1101(d)(12) of the Tax Law defines the terms "roof garden, cabaret or other similar place" as:

> "Any roof garden, cabaret or other similar place which furnishes a public performance for profit."

The Sales and Use Tax Regulations further define the terms "roof garden, cabaret or similar place" as follows:

> "Any room in a hotel, restaurant, hall or other place where music and dancing privileges or any entertainment, are afforded the patrons in connection with the serving or selling of food, refreshments or merchandise." (20 NYCRR 527.12(b)(2)(ii)).

The definition of "roof garden, cabaret or other similar place" found in the sales and use tax regulations is derived from the definition contained in the former federal excise tax on cabaret charges. (Internal Revenue Code sections 4231, 4232). That definition included establishments where food or drink was served to patrons while they were being provided with entertainment. It did not matter, for purposes of the federal definition, that the purchase of food or drink was not required or that customers were primarily interested in the entertainment offered, rather than the purchase of food or drink. Avalon Amusement Corporation v. United States, 165 F 2d 653; Geer v. Birmingham, 185 F2d 82. However section 4232 of the Internal Revenue Code was amended to exclude from the federal excise tax those establishments where the sale of food and refreshments was "merely

incidental" to the entertainment offered. In construing this amendment, the federal courts have stated that the principal factor to be considered in determining whether the sale of food and refreshments is "merely incidental" is the ratio of revenue derived from the sale of food and refreshments to gross revenue. Roberto v. United States 357 F. Supp. 862, aff'd 518 F. 2d 1109; Dance Town U.S.A., Inc. v. United States, 319 F. Supp. 634. In this regard, several courts have held that comparable percentages of revenue from the sale of food and beverages are more than "merely incidental". (Dance Town, U.S.A., Inc. v. United States, supra - 45.1% of revenue from the sale of food and beverages; Landau v. Riddell, 255 F. 2d 252 47.1%; Billen v. United States 273 F. 2d 667 - 50%; Shutter v. United States 406 F. 2d 906 - 47%).

Furthermore, the fact that Petitioner holds its establishment out to the public, by virtue of its name, as a place where food and beverages are sold to patrons and the fact that food and beverages are sold both one hour before and one-half hour after performances are further evidence that the sale of food and beverages is not "merely incidental".

Clearly, Petitioner is operating an establishment where entertainment is afforded to patrons in connection with the serving or selling of food or refreshments. Furthermore, the selling of food and refreshments is more than merely incidental to the providing of entertainment since receipts from such sales amount to over 45% of Petitioner's total receipts.

Accordingly, it must be concluded that Petitioner's establishment is a "roof garden, cabaret or other similar place" within the meaning and intent of section 1105(f)(3) of the Tax Law and section 527.12(b)(2)(ii) of the sales and use tax regulations. All of the charges for admission to Petitioner's establishment are subject to the tax imposed by section 1105(f)(3) of the Tax Law.

DATED: August 19, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed tn Advisory Opinions are limited to the facts set forth herein.