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

TSB-A-88 (40)S
Sales Tax
August 11, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S880120B

On January 20, 1988, a Petition for Advisory Opinion was received from Philip Ciganer d/b/a The Towne Crier Cafe, RD #2, Box 140A, Dover Plains, New York 12522.

ISSUE

The issue raised is whether admission charges to Petitioner's cafe are subject to sales tax imposed by section 1105(f)(3) of the Tax Law.

FACTS

Petitioner presents a series of small folk music concerts featuring music and performers from throughout America and around the world. Petitioner's establishment is comprised of a stage, sound booth, dressing room, and limited seating (approximately 95 persons). There is no dance floor. Approximately 28% of the total area of Petitioner's establishment is devoted to kitchen space, a self-service counter and dining facilities. Petitioner offers a variety of foods including cheese platters, salads, hummos, tandoori chicken wings, szechwan noodles, pesto linguine, soup, beer and wine.

Petitioner's receipts from the sale of food and refreshments amount to 25% of his gross receipts. Petitioner's receipts from admission charges constitute 75% of his gross receipts.

Petitioner's establishment is open only when performances are scheduled.

LAW

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 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 ..." Pursuant to Section 1101(d)(12) of the Tax Law as amended by Chapter 609 of the Laws of 1986, the phrase "roof garden, cabaret or other similar place" means:

> ... Any roof garden, cabaret or other similar place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances.

Thus, an establishment which provides public performances, musical entertainment or dancing and, additionally, sells or serves food, refreshment or merchandise falls within the definition of roof garden, cabaret or other similar place unless the serving or selling of food, refreshments or merchandise is merely incidental to the performances, entertainment or dancing.

DISCUSSION

Initially, it is noted that the issue raised by Petitioner applies to the period March 1, 1984 to August 31, 1984. The amendment to section 1101(d)(12) of the Tax Law, enacted by Chapter 609 of the Laws of 1986, is by the terms of Chapter 609 deemed to have been in full force and effect on and after March first, nineteen hundred eighty-one, and applies to all assessments which have not been finally and irrevocably fixed or to which the time to judicially appeal therefrom has not expired on July 24, 1986. The retroactive application of this provision was challenged in the case of Epstein d/b/a My Father's Place v. State Tax Commission, 132 A.D.2d 52 (1987). However, the court determined that:

> Retroactive legislation is not necessarily unconstitutional simply because it upsets settled expectations or lays new liability for a past act. Here the amendment to the cabaret tax reflects a sound and lawful legislative purpose, that of disambiguating and expanding the tax. It is retroactive presumably because the Legislature assumed enterprises like My Father's Place were already within the scope of the law prior to its amendment.
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> Epstein d/b/a My Father's Place v. State Tax Commission, 132 A.D.2d at 55.

Inasmuch as Petitioner provides public performances for profit in conjunction with the serving and selling of food and refreshments, Petitioner's establishment will fall within the definition of "roof garden, cabaret or other similar place" unless it is demonstrated that its sale of food and refreshments is merely incidental to such performances.

The tax imposed pursuant to section 1105(f)(3) of the Tax Law is derived from the former federal excise tax on cabaret charges. IRC §4231. Thus, the numerous federal court decisions on this topic provide considerable illumination in determining when the sale of food and refreshments is merely incidental.

It must be recognized that there is no simple test to determine when the sale of food and refreshments is merely incidental. Stevens v. United States, 302 F.2d 158, 164. Clearly, the amount of receipts attributable to the sale of food and refreshments as a percentage of total receipts has been viewed by the courts as the single most important factor in making this determination. Stevens v. United States, supra.

In some situations, the percentage of receipts attributable to the sale of food and refreshments may be so great or so small that this factor alone will be sufficient to determine whether such sales are merely incidental. Ross v. Hayes, 337 F.2d 690, 692. In other situations, other factors must be considered as well, including the amount of space devoted to the relevant activities, the nature and extent of food and refreshment services and the nature and hours of entertainment.

SOURCES OF INCOME

In determining whether the sale of food and refreshments is merely incidental, the courts have consistently held that the percentage of receipts from the sale of food and refreshments is the single most important factor. The courts have found the sale of food and refreshments to be more than merely incidental when the percentage of receipts from such sales ranged from 45.1%, Dance Town, U.S.A., Inc., v. United States, 319 F. Supp. 634 to 74.7%, Roberto v. United States, 357 F. Supp 862, aff'd 518 F.2d 1109. Conversely, in Geer v. Birmingham, 88 F. Supp 189, rev'd 185 F.2d 82, the establishment's receipts from the sales of food and refreshments, which totaled 27%, were found to be merely incidental.

It is noted that in the instant case, Petitioner's receipts from the sale of food and refreshments amounts to a mere 25% of its total receipts, which amount is less than that of the establishment in the Geer case. However, inasmuch as one-quarter of Petitioner's receipts are from the sale of food and refreshments, it must be concluded that such receipts are not so low that this question may be determined based upon this factor alone.

EXTENT OF DINING FACILITIES

The courts have consistently analyzed the facilities provided in an establishment to determine whether the preparation and consumption of food and refreshments plays a significant role in the operation of the establishment. Dance Town , U.S.A., Inc., v. United States, supra., Shutter v. United States, 406 F.2d 906, Luna v. Campbell, 302 F.2d 166, Billen v. United States, 273 F.2d 667.

Thus, as the percentage of space devoted to the preparation and consumption of food and refreshments (e.g. kitchen space, bars and tables and other areas suitable for dining) becomes greater in comparison to the percentage of space devoted to entertainment activities (e.g. band space, dance floors, stages and lighting facilities), it becomes more likely that the selling of food and refreshments is more than merely incidental.

In the instant case, Petitioner's establishment consists of a stage with seating suitable for viewing the performance on stage, dressing rooms, a kitchen with a self-service counter and a small number of tables with chairs suitable for dining. No dance floor is available. The majority of available space in Petitioner's establishment is devoted to activities other than the preparation and consumption of food and refreshments. It is noted that approximately 28% of Petitioner's space is devoted to the preparation and consumption of food and refreshments while in the Ross case, the court found persuasive that less than 25% of the space at issue was devoted to such uses.

FOOD SERVICE

Where the sale of refreshments assumes importance as a significant attraction for its own sake, it is not merely incidental. Stevens v. United States, 302 F.2d at 163. Thus, the selection of foods and refreshments served, the method and extent of preparation of such foods and refreshments,

the dining atmosphere created and extent of service available would all tend to indicate the extent to which such foods and refreshments serve as an attraction in their own right. For example, in Ross v. Hayes, 337 F.2d 690, the court concluded that the beer, Coca-Cola, Seven-Up, ice, potato chips, pretzels, crackers, peanuts and chewing gum in question offered little or no attraction to the patrons of the establishment and, therefore, were merely incidental to the real attraction which was the dancing provided.

By way of contrast, the court noted in Dance Town, U.S.A., Inc. v. United States, supra. at p. 636, that

> Without food and drink, plaintiff's customers, exhausted by their terpsichorean activities, may well not have lingered long upon the premises before seeking elsewhere an oasis at which to refresh and refuel. Dancetown's bar was thus not only an ample source of revenue in its own right, but a magnet that guaranteed the presence throughout the evening of many of plaintiff's customers and, we might add, kept them coming back.

In contrast to the Ross case, Petitioner serves such items as cheese platters, salads, hummos, tandoori chicken wings, szechwan noodles, pesto linguine, soup, beer and wine. Such items certainly are more likely to attract customers for their own sake due to the uniqueness of their preparation than would the potato chips and pretzels of the Ross case. On the other hand, it is noted that Petitioner does not charge a minimum food charge, serves no food or refreshments during performances and provides only a self-service counter with no table service.

NATURE AND HOURS OF ENTERTAINMENT

Petitioner's establishment is known for the small folk music concerts which it presents. The establishment is open only on evenings of performances. The performances are the only sources of entertainment to the patrons; there is no dancing or other music available to entertain patrons. Moreover, it is unlikely that people would frequent Petitioner's establishment just for the variety of foods served because Petitioner is only open on evenings of performances and because food is served only in between performances. Petitioner is never opened solely to sell food and refreshments. Thus, the food and refreshments offered are clearly an adjunct to the concerts.

CONCLUSION

Based upon the totality of Petitioner's facts and circumstances, it is concluded that the selling of food and refreshments by Petitioner is merely incidental to the presentation of folk music concerts inasmuch as receipts from the sale of food and refreshments amount to only 25% of Petitioner's total receipts; facilities devoted to the preparation and consumption of food make up only 28% of Petitioner's facility and the sale of refreshments does not assume importance as a significant attraction for its own sake. Additionally, Petitioner does not charge a minimum food charge, serves

no food or refreshments during performances and provides only a self-service counter with no table service; and Petitioner's establishment is open only on evenings of performances.

Accordingly, Petitioner's cafe is not a "roof garden, cabaret or other similar place "within the meaning and intent of section 1105(f)(3) of the Tax Law and charges for admission to Petitioner's cafe are not subject to sales tax under section 1105(f)(3) of the Tax Law.

Finally, it is noted that the Laws of 1986, Chapter 609, §2 establish transitional provisions for the application of the tax here at issue if certain specified conditions are met. However, inasmuch as such conditions are clearly not applicable to Petitioner's circumstance, such transitional provisions do not apply to Petitioner.

DATED: August 11, 1988

FRANK J. PUCCIA
Director
Technical Services Bureau