

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

TSB-A-90(47)S
Sales Tax
September 27, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900628A

On June 28, 1990, a Petition for Advisory Opinion was received from ARASERVE, Inc. P.O. Box 7548, Philadelphia, PA 19101.

The issue raised by Petitioner, ARASERVE, Inc., is whether purchases or sales of certain "miscellaneous expense" items by Petitioner (a food management company) are subject to New York State and local sales tax when such items are used by Petitioner in fulfillment of a contractual agreement entered into with a New York State school district and the agreement provides that Petitioner be reimbursed for such purchases by the school district.

Petitioner and a school district located within New York State have entered into a contract whereby Petitioner manages the school district's food service program, providing food service for students, faculty and staff. Petitioner has the exclusive right to operate the school lunch program and/or breakfast program and/or special milk program. The school district reimburses Petitioner for allowable direct costs up to a maximum amount per meal.

Allowable direct costs include miscellaneous expenses which are defined as paper supplies (including decorations), equipment rental, cleaning materials, commodity handling and warehousing charges, travel as required for effective program management and agreed upon by the school district, uniforms, menu paper and printing, taxes and licenses, laundry and insurances and other costs.

The agreement entered into between Petition and the school district states, in part:

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1. Scope and Purpose

- E. The F.S. Contractor [Petitioner] shall be an independent contractor and not an employee of the S.F.A. [school district]...

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6. Purchases

- B. Title to all commodities purchased by the F.S. Contractor shall remain with the F.S. Contractor.

In correspondence to Petitioner dated May 22, 1990, the school district notes that upon review of detailed transactions submitted by Petitioner for monthly reimbursement, several invoices include a charge for sales tax. The school district contends that as it is a non-profit organization, items purchased from Petitioner should not include sales tax. The school district reasons that if it had directly purchased and paid for the same items, sales tax would not have been invoiced. It is also the school district's contention that Petitioner appears to be merely buying items for the school lunch program, paying for such items and then invoicing the school district for the exact amount paid. The

school district questions why Petitioner cannot issue either a Form ST-120, Resale Certificate or an exemption certificate using the school district's tax exempt number?

Section 1105 of the Tax Law states, in part:

Imposition of sales tax - ... there is hereby imposed and there shall be paid a tax ...upon:

- (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1101(b)(4)(i) of the Tax Law defines a retail sale as:

A sale of tangible personal property to any person for any purpose other than (A) for resale as such...

Section 1116 of the Tax Law states, in part:

Exempt organizations - (a) Except as otherwise provided in this section, any sale... to any of the following ... shall not be subject to the sales and compensating use taxes imposed under this article:

- (1) The State of New York or any of its ... political subdivisions where it is the purchaser, user or consumer...

Section 529.2 of the New York State Sales and Use Tax Regulations states, in part:

New York State, agencies, instrumentalities, public corporations, and political subdivisions thereof. [Tax Law, §1116(a)(1)]

- (a) Governmental entities.
- (3) A political subdivision as used in this section means a ... school district ... of this State.
- (b) As purchaser.

(1) New York State or any of its ... political subdivisions (hereinafter referred to as New York State governmental entities) are not subject to sales or use tax when they are the purchaser, user or consumer of tangible personal property or services....

(2) New York State governmental entities as purchasers, users, consumers ... must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document.

Pursuant to Section 1116(a)(1) of the Tax Law and Section 529.2 of the New York State Sales and Use Tax Regulations, sales to New York State or political subdivisions thereof, in the instant case the school district, are not subject to the sales and compensating use tax imposed by Articles 28 and 29 of the Tax Law.

However, in order for the exemption provided under Section 1116(a)(1) of the Tax Law to apply to Petitioner's purchases of miscellaneous expense items for use by Petitioner in performing food service operations for the school district, it must be clearly established that such items are directly purchased by Petitioner as a properly authorized agent of the school district. (The Seiler Corporation, Dec St Tax Comm, September 13 1985, TSB-H-85(236)S.)

In the instant case the school district, either itself or through Petitioner, was not the direct purchaser, user or consumer of the miscellaneous expense items at issue. Petitioner and the school district have not entered into an agreement whereby Petitioner is designated to act as agent for the school district. To the contrary, the purchases in question were initiated by Petitioner's personnel, the vendor invoices arising therefrom were sent to the school district location for verification of quantity, pricing, etc. and then forwarded to Petitioner's home office for payment to the vendors by Petitioner. Petitioner sought monthly reimbursement for such expenses by submitting a listing of detailed transactions to the school district. Additionally, Petitioner used and/or consumed the items at issue in performing its food services management operation for the school district.

Since Petitioner has not been properly authorized to act as agent for the school district, Petitioner is precluded from making tax exempt purchases on behalf of the school district as provided under Section 1116(a)(1) of the Tax Law. Moreover, as title to the items purchased by Petitioner does not pass to the school district, such items are not considered to be resold to the school district but are deemed to be used and/or consumed by Petitioner in performing its food service management operation. Therefore, Petitioner is precluded from making such purchases tax exempt as purchases for resale pursuant to Section 1101(b)(4) of the Tax Law.

Accordingly, when Petitioner submits listings of detailed transactions, including miscellaneous expense items, to the school district, the sales tax shown is considered to be an expense incurred by Petitioner in performing its food service management operation and is not considered to be a sales tax imposed on the school district.

DATED: September 27, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.