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

TSB-A-91 (25)S
Sales Tax
March 7, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S901101A

On November 1, 1990, a Petition for Advisory Opinion was received from Tamara NY, NY Limited Partnership, c/o Maple Interactive Entertainment, 151 John Street, Suite 501, Toronto, Ontario M5V 2T2.

The issue raised by Petitioner, Tamara NY, NY Limited Partnership, is whether tickets sold for the presentation of a live-dramatic performance of "Tamara" were not subject to the sales and use tax imposed on a roof garden, cabaret or other similar places Section 1105(f)(3) of the Tax Law, because the service of food and drink was merely incidental to the performance in accordance with Section 1101(d)(12) of the Tax Law.

Petitioner presented a live-stage dramatic performance of "Tamara" at the New York Armory on Park Avenue in New York City. The presentation was unique in nature as reflected by the "passport" type booklet utilized as the entrance ticket. The audience members were treated as participants in the dramatic performance and, as such, pursuant to the script received food when the actors in the performance would sit down for dinner in the context of the performance. No food or drinks were served other than at times as provided by the script. The meal consisted of a sumptuous banquet buffet presented by Le Cirque Restaurant, designed by Chef Daniel Boulud and Dounia Rathbone and catered by Remember Basil.

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.

Inasmuch as Petitioner provided public performances for profit in conjunction with the serving and selling of food and refreshments, Petitioner's establishment falls within the definition

of "roof garden, cabaret or other similar place" unless it is demonstrated that its sale of food and refreshments was merely incidental to such performances.

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 food and refreshments, the dining atmosphere created and extent of service available would all tend to indicate the extent to which such food 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, an announcement prepared by Petitioner for the performance stated that a "sumptuous banquet buffet" presented by Le Cirque, designed by Chef Daniel Boulud and Dounia Rathbone and catered by Remember Basil would be served. The "passport ticket" set forth the menu which included such items as champagne, french wines, primi piatti, roast leg of lamb, curried breast of chicken "Le Cirque", pasta primavera "Le Cirque" and creme brulee "Le Cirque". Such items certainly were more likely to attract patrons for their own sake due to the uniqueness of their preparation than would the potato chips and pretzels of the Ross case.

Accordingly, the "sumptuous banquet buffet" presented by Le Cirque was a significant attraction for its own sake, and was not merely incidental to the performance. Therefore, the tickets sold by Petitioner for the performances of "Tamara" were subject to sales and use tax pursuant to Sections 1105(f)(3) and 1101(d)(12) of the Tax Law.

DATED: March 7, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division