

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

TSB-A-91 (68)S
Sales Tax
October 28, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910415A

On April 15, 1991, a Petition for Advisory Opinion was received from ARA Services, Inc., PO Box 7548, Tax Department, 19th Floor, Philadelphia, PA 19101.

The issue raised by Petitioner, ARA Services, Inc., is whether a management fee and other cost reimbursements paid to Petitioner to operate a for-profit cafeteria which is open to the general public will be subject to sales tax.

Petitioner is in the business of providing food service management pursuant to contracts with clients under various fiscal arrangements. Petitioner is contemplating entering into a contract with a prospective landlord who operates a cafeteria in building owned by him on Long Island. The client is not an employer that is operating a cafeteria for his employees. The client will not subsidize the cafeteria or Petitioner for the benefit of his employees. The cafeteria food and beverage prices will be set with reference to existing market conditions for its type of business located in the general vicinity in order to make a profit. The cafeteria will be open to the general public.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services. The providing of a management service to operate a for-profit cafeteria which is open to the general public is not a service enumerated under Section 1105(c) of the Tax Law.

Section 527.8(k) of the Sales and Use Tax Regulations provides:

(1) An employer who by contract or otherwise engages a caterer or food service contractor to provide food and drink or, service to employees at the employer's expense is the purchaser of food and drink subject to the sales tax.

Example 1: Employer E provides food and drink to his employees without charge. E contracts with a food service contractor F to prepare and serve the food and drink for a fee to be paid by E. The fee paid by E is subject to tax as a receipt from the sale of food and drink.

(2) Sales of food, drink or service to employees through a cafeteria on an employer's premises are subject to the sales tax.

Example 2: Employer E maintains a cafeteria or restaurant on his premises for the purpose of selling food and drink to his employees. The sale of the food and drink to the employees is taxable.

(3) When the employer subsidizes the caterer or food service contractor, such subsidy regardless of whether it is called a management fee, guarantee of profit or some other designation is taxed as a receipt from the sale of food and drink.

Example 3: Caterer C agrees to charge employer E's employees a scheduled amount for each item of food and drink it sells to them. E agrees to pay Caterer C an amount, in addition to the employees' payments, which would guarantee a 12 1/2 percent profit from the sales to the employees. The amount paid by E to the caterer is a taxable receipt from the sale of food and drink.

Example 4: Employer E enters into an agreement with Caterer C. The agreement provides that C prepare, service and sell food and drink to E's employees at a price mutually agreed to and in addition, E will pay a subsidy to C for operating the facility. The subsidy will be in such an amount to allow C to make a profit on its sales of food and drink to the employees. However, if C's profits from the sale of food and drink exceed a net figure, C and E will share the excess profits in an agreed apportionment. Irrespective of the profit sharing agreement, the subsidy paid by E is considered to be a receipt from the sale of food and drink.

(4) If a subsidy is paid by an employer in addition to a specified amount paid by the employee, both amounts are taxed as the receipt from the sale of food and drink.

Example 5: Employer E will pay 50¢ to a caterer for each sale of food and drink to E's employees. E's employees will pay any amount due which exceeds the 50¢ paid by E. Both the amount paid by the employee and the 50¢ paid by E are taxable receipts from the sale of food and drink.

(5) The caterer or food service contractor is a vendor required to collect the tax on receipts from either the employees employer or both.

In the Matter of Stouffer Management Food Service, Inc. v. Tully, 98 Misc 2d 1128, affd without opn 69 AD2d 1023, mot for lv to app den 47 NY2d 709, the court held that a food service corporation which operates in-house restaurant facilities for employees, under contracts with various employers, is liable for sales tax on reimbursed costs, management fees and subsidy payments which are received from the corporate clients pursuant to various contracts in which the employees either do not pay for the food or pay a small portion.

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The operation of the cafeteria facilities in the instant case is analogous to the operation of the facilities held subject to sales tax by section 527.8(k) of the Sales and Use Tax Regulations. It differs only in that instead of being an employer subsidized cafeteria as set forth in the Regulations, it is a landlord subsidized cafeteria.

Therefore even though the cafeteria will be open to the general public, will not be limited to the employees of the client and will establish prices for food and beverages that will be set in order to make a profit, the management fee and other cost reimbursements that may be paid to Petitioner by the landlord to operate the cafeteria will be subject to sales tax since Petitioner will be providing a subsidized restaurant or catering service as envisaged in Stouffer Management Food Service, Inc. v. Tully, supra.

DATED: October 28, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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