

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

TSB-A-99(8)S
Sales Tax
January 28, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980730A

On July 30, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jeffrey J. Coren, CPA, P.C., 225 West 34th Street, Suite 2015, New York, NY 10122.

The issue raised by Petitioner, Jeffrey J. Coren, CPA, P.C., is whether purchases of liquor, beer or wine by bars and/or restaurants are subject to compensating use tax when such liquor, beer or wine is provided, at no extra charge, to their customers in conjunction with the sale of fixed-price meals or other drinks.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Certain restaurants and bars may have both advertised and unadvertised policies to offer customers a free alcoholic beverage, by the drink or by the bottle, when the customer purchases a meal or other drinks for a fixed price. For example, an after dinner cordial or a bottle of wine will be provided at no extra charge to the customer when a restaurant meal is purchased for a fixed price. Another example is when a restaurant or bar has a Happy Hour or other provision which offers customers, for the price of one or more drinks, an additional drink at no extra charge. The total price paid by the customer for the food and/or drinks is a lesser amount than the sum of the charges for the items as displayed or separately stated on the menu. The price paid by the customer for the total meal and/or beverages is, however, usually significantly greater than the cost of the total meal and/or drinks, including the free drinks, to the restaurant or bar.

Applicable Law and Regulations

Section 1101(b)(4)(i) defines retail sale, in part, as:

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

Section 1105(a) of the Tax Law imposes sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(d)(i) of the Tax Law imposes a tax on "[t]he receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state. . . ."

Section 1110 of the Tax Law provides, in part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

With respect to the resale exclusion, Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Example three: A vendor purchases catalogs and distributes them to his potential customers for a minimal charge, which does not reflect the cost to him. He is the retail purchaser of the catalog, and is required to pay the tax thereon. He cannot charge his customer tax on the charge for the catalog.

Opinion

The businesses referred to by Petitioner conform to the classification of "restaurants, taverns or other establishments" whose sales of food and drink fall within the purview of Section 1105(d) of the Tax Law. Therefore, receipts from their sales of such food and drink are subject to sales tax.

Provided such establishments are registered for sales tax purposes, they are not required to pay sales tax on their purchases of liquor, wine or beer for resale. In order for the resale rule to apply, the property to be resold must be purchased for the sole purpose of resale (see John B. Pike and Son, Inc., Adv. Op Comm. T.F., July 26, 1985, TSB-A-85(29)S. The withdrawal of such liquor, wine or beer for any other reason would subject the purchase to sales or use tax, since it is then deemed a retail sale to the purchaser thereof, i.e., the restaurant or bar. See Section 531.3(a)(2) of the Sales and Use Tax Regulations.

In J.C. Penney Co., Inc., Dec Tx App. Trib., June 30, 1988, TSB-D-89(25)S, the Tribunal analyzed Section 526.6(c)(4)(ii) of the Sales and Use Tax Regulations to resolve the issue of whether the sale of catalogs to a retailer that are subsequently transferred to its customers for less than the catalogs' cost is a sale for resale or a retail sale subject to tax under Section 1105(a) of the Tax Law. While Section 526.6(c)(4) does not specifically apply to the sale of free drinks taxable under Section 1105(d) of the Tax Law, the analysis set forth therein suggests a methodology to analyze whether the liquor, beer and wine purchased by a restaurant or bar are purchased exclusively for resale, or whether the restaurant or bar is the retail purchaser of these items when providing a "free" drink in conjunction with the sale of other fixed-price drinks or a meal at no extra charge.

The Tribunal opined in J.C. Penney that a retail sale of promotional materials occurs where the advertiser recovers at least 100% of its cost of the property it is selling. Under Section 1105(d) of the Tax Law, a vendor sells a hybrid of property and service when it sells food or drink (the tangible personal property) prepared and served on the premises (the service). See Matter of Burger King v. State Tax Commn., 51 NY2d 614. The vendor has costs for both the property and for the service, which it must recover in order to find that its purchase of the property was for resale, and therefore not taxable to the vendor. In this case, Petitioner indicated that the price paid by a customer for the total meal and/or beverages is usually significantly greater than the cost of the total meal and/or beverages, including the extra drink, to the restaurant or bar. Accordingly, the purchase of liquor, beer or wine by a restaurant or bar for use in providing a "free" drink in conjunction with the sale of other fixed-price drinks and/or meals at no extra charge would be exempt from tax as a purchase for resale, provided that the charge to the customer for the meal or drink(s), including the free drink or bottle of wine, is greater than the restaurant/bar's combined costs for the property (food and/or drink) used to make the meal or drinks being sold, plus the restaurant/bar's costs for the "free" drink, plus the restaurant/bar's costs for the labor to prepare and serve them.

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It is noted that when a restaurant or bar provides a drink in conjunction with the sale of a meal or another drink at no extra charge, the sales tax is to be computed on the actual amount paid by the customer for the two items. See Section 1101(b)(3) of the Tax Law and Section 526.5 of the Sales and Use Tax Regulations.

DATED: January 28, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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