

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

TSB-H-80 (127) S
Sales Tax
July 15, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S800408A

On April 8, 1980, a Petition for Advisory Opinion was received from Sky Chefs, Division of Flagship International, Inc. c/o American Airlines, Inc., P.O. Box 61616 DFW Airport, Texas 75261.

The issue raised is whether Petitioner's purchases of paper containers, cups, foil, silverware, bags, salad and sandwich bags, etc., which it utilized to package food and beverage as complete meals sold to airlines constituted purchases for resale.

Petitioner prepares complete meals for sale to airlines, its service including both the preparation and packaging of the meals. The meals as sold to the airlines include ". . . foil and saran wrap where necessary, beverages and containers for such drinks, utensils, sanitary wrapping and accessories." Petitioner asserts that these items ". . . become an integral part of the complete meal . . . [,] are a prerequisite to the sale of the meal to an airline . . . and none of the items are included merely to facilitate the sale nor subsequently reused by Sky Chefs." Petitioner asserts that it is not engaged in the catering business because it provides only complete meals sold in an unheated state and because it provides no service ". . . in the distribution of the meal for final consumption." The total price charged for a complete meal includes ". . . the underlying costs of the items comprising the complete meal, together with an allocated portion of the Company's overhead and reasonable profit margin."

Section 1105(a) of the Tax Law, contained in article 28, imposes a State sales tax on the ". . . receipts from every retail sale of tangible personal property, except as otherwise provided in this article." Section 1101(b)(4) defines a retail sale, in relevant part, as a ". . . sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property"

Therefore, Petitioner's customers did not purchase the containers, cups, sandwich bags, etc. "as such" but rather received these items merely as an incident to the purchase of the meals. There was no consideration separately paid with respect to such items. It follows that the items were used or consumed by Petitioner in preparing and delivering the meals, and were not resold "as such" to its customers.

In addition, Petitioner did not sell the items in question as a "physical component part of tangible personal property." These items can at no point be said to have been so intimately conjoined with the food and drink sold by it as to have become a physical component part thereof. Further, even were the items in question considered to have become physical component parts of the food and drink sold by Petitioner, the sale for resale exclusion would still not be applicable. Food and drink sold in a manner described in section 1105(d)(i) of the Tax Law is not tangible personal property for purposes of the sales tax provisions of the Tax Law. Section 1105(d)(i) refers, in relevant part, to sales ". . . of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers . . . (3) in those instances where the sale is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption

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off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten." The sale of food and drink in this manner is considered to be a hybrid transaction involving both the sale of tangible personal property and a service, and the receipts from such sales are subject to a tax imposed under section 1105(d) rather than 1105(a) of the Tax Law. The latter is applicable only to sales of tangible personal property. Inasmuch as Petitioner's sales are of the type here described, the subject of such sales is not tangible personal property. Petitioner's contention that it is not a caterer, and therefore that its sales are not described in section 1105(d)(i), because it provides no service ". . . in the distribution of the meal for final consumption" is not tenable. Section 527.8(f)(2) of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, for example, relates to the taxation of sales by caterers both where services are supplied and ". . . where the caterers merely deliver the items purchased and offer no other services after delivery . . ." Clearly, a caterer remains such irrespective of whether or not it provides services subsequent to delivery.

The force of the foregoing is in no way lessened by the fact that a special exemption is provided in section 1105(d)(ii) for airlines making purchases of food and drink sold in a manner described in section 1105(d)(i). That exemption is applicable to airlines as a species of purchaser of food and drink, and not to the category of prepared meals. It should be noted, in addition, that inasmuch as the prepared meals sold by Petitioner do not constitute tangible personal property, the exemption from sales tax provided for in section 1115(a)(19) of the Tax Law is not applicable. That exemption applies to certain materials used by a vendor in packaging or preparing tangible personal property for sale.

Dated: June 30, 1980

s/ LOUIS ETLINGER
Deputy Director
Technical Services Bureau