

Sales Tax Information Related to Audio/Visual Equipment Used by Hotels, Restaurants, Taverns, Banquet Houses, Caterers, and Similar Establishments

Hotels, restaurants, taverns, banquet houses, caterers, and similar establishments (hotels or other establishments) often use audio/visual equipment (AV equipment) in various aspects of their business operations. For example, a hotel or other establishment may purchase or rent AV equipment from an AV equipment vendor (AV company) to provide the equipment to a customer for an event. The event may or may not involve the sale of food and beverages to the customer. This memorandum is intended to clarify the application of New York State and local sales and use taxes (sales tax) to the purchase, rental and use of AV equipment by hotels or other establishments.

General information

The Tax Law imposes sales tax on the receipts, including any cover, minimum, entertainment or other charge (including any charge for the provision of AV equipment), from every sale of food and drink of any nature sold by restaurants, taverns, caterers or other establishments. Sales tax is imposed on these charges in all cases where:

- (1) the sale is for consumption on the premises where sold; or
- (2) the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink (i.e., catering services). (See Tax Law section 1105(d)(i).)

In addition, sales tax is imposed on retail sales of taxable tangible personal property and sales, other than for resale, of certain specified services in New York State, unless otherwise exempt (for example, where the purchaser is a sales tax exempt organization). For sales tax purposes the term *sale* includes any transfer of title or possession of the property or both (an outright sale), and the exchange or barter, rental, lease, or license to use or consume property, for consideration. A retail sale of tangible personal property does not include any sale for resale, including the sale of tangible personal property for use in performing certain taxable services where the property sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service. Therefore, in general, sales of tangible personal property and certain services for resale are not subject to sales tax. However, sales of tangible personal property where the purchaser uses or consumes the tangible personal property are not sales for resale. (See Tax Law sections 1101(b)(4),(5), 1105(a) and (c).)

With regard to caterers, the Sales and Use Tax Regulations provide that tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to sales tax. Examples of taxable tangible personal

property or services used or consumed by a caterer in performing its service includes tables, chairs, bars, linens, napkins, silverware, glassware, chinaware, serving utensils, table covers, ice used to chill drinks, and certain floral arrangements. (See Sales and Use Tax Regulations section 527.8(f)(2)(i).)

The following explains how the law and regulations apply to the sale and rental of AV equipment by hotels and other establishments.

Rental or purchase of AV equipment by a hotel or other establishment that is provided to a customer in connection with the sale of food and drink

When a hotel or other establishment provides or arranges for the provision of AV equipment for a charge to a customer in connection with the sale of food and drink to that customer, the AV equipment is considered part of the sale of the food and drink. In this situation, all charges by the hotel or other establishment to the customer, including the charge to the customer for the AV equipment, constitute receipts from the sale of food and drink and are subject to sales tax. The AV equipment in this situation is not considered to be resold. Therefore, the resale exemption does not apply to charges to the hotel or other establishment when it purchases or rents the equipment.

Example 1: A banquet house provides space and sells food and beverages to customers who wish to hold events at the banquet house. If a customer requests that AV equipment be provided for the event, the banquet house contracts with a company for the rental of AV equipment. The banquet house, in turn, charges the customer a fee for the use of the AV equipment as part of its bill for the event.

The rental of the AV equipment to the banquet house by the company constitutes the retail sale of tangible personal property and not a sale for resale. Therefore, the rental of the AV equipment is subject to sales tax. In addition, the entire charge by the banquet house to the customer for the event, including the charge for the use of the AV equipment, is subject to sales tax as the sale of food and drink.

Rental or purchase of AV equipment by a hotel or other establishment that is provided to a customer without the sale of food and drink

If a hotel or other establishment rents or purchases AV equipment for a customer who is **not** purchasing food and drink, the rental or purchase by the hotel or other establishment is a purchase for resale and is exempt from state and local sales taxes. In order to claim this exemption, the hotel or other establishment must provide the AV company with a properly completed *Resale Certificate*, Form ST-120, within 90 days of the date of the sale. Also, the hotel or other establishment must collect sales tax from its customer on its charge for the AV equipment.

Also, to claim an exemption as a purchase for resale, the hotel or other establishment must be renting or purchasing the equipment **exclusively for resale**. Therefore, if a hotel or other establishment rents or purchases AV equipment for mixed use, the resale exemption cannot be claimed when the equipment is rented or purchased. For example, if a hotel or other establishment rents or purchases AV equipment that will be provided both to customers that purchase food and drink and to customers that do not purchase food and drink, the resale exemption cannot be claimed by the hotel or other establishment when the equipment is rented or purchased.

***Example 2:** A hotel rents a meeting room to a customer for a two-day business meeting. At the customer's request, the hotel rents AV equipment that will be used by the customer during the meeting. The hotel will charge a separate fee for providing the equipment to the customer. No food or beverages will be provided by the hotel to the customer.*

Assuming no other use of the AV equipment, the rental of the AV equipment by the hotel constitutes the sale of tangible personal property exclusively for resale. Therefore, provided the hotel gives the AV company a properly completed Resale Certificate within 90 days of that transaction, the rental charge by the AV company to the hotel is not subject to sales tax. However, the rental of the AV equipment by the hotel to the customer is a retail sale of tangible personal property subject to sales tax. Therefore, the hotel must collect state and local sales tax from the customer on the equipment rental charge.

***Example 3:** Assume the same facts as in Example 2, except that as part of the agreement to rent the meeting room and for an additional charge, the hotel will provide a buffet lunch and beverages in a room adjacent to the meeting room on each day of the meeting.*

Because the hotel is providing food and beverages, the total charges for the rental of the meeting room, the AV equipment and the food and beverages are all subject to sales tax. In addition, the rental of the AV equipment by the hotel from the AV company is subject to sales tax because the resale exclusion does not apply to this sale. This result applies whether the rental of the meeting room with the provision of the AV equipment and the sale of the food and drink are done under separate contracts between the hotel and the customer or under a single contract.

Rental of AV equipment by a customer of a hotel or other establishment directly from an unrelated vendor

Where a customer separately contracts with a vendor that is an entity unrelated to the hotel or other establishment for the rental of the AV equipment, the transaction is treated as a separate sale of tangible personal property by the unrelated vendor to the customer and is subject to sales tax. In this situation, the hotel or other establishment is not considered to be renting the AV equipment to the customer. However, note that this memorandum does not address situations where the customer pays the vendor for the rental of the AV equipment through the hotel's or

other establishment's master account. This situation will be addressed on a case by case basis with the hotel or other establishment.

***Example 4:** When a customer of the hotel wishes to rent AV equipment from the third party AV Company for an event at the hotel, the customer separately contracts with AV Company for the provision of AV equipment and any related services at its event. AV Company's invoice to the customer shows the total charges for the equipment rental and the applicable state and local sales tax due on the rental. The customer pays AV Company separately from the hotel.*

*Based on these facts, AV Company, **not the hotel**, is considered to be the seller/vendor for the rental of the AV equipment and related services to the customer. AV Company must be registered to collect sales tax, and must remit the tax it collects on its own sales and use tax return.*

Rental of AV equipment by an affiliate (related entity) of a hotel or other establishment for a customer who is purchasing food and drink from the hotel or other establishment

Where a customer separately contracts for the rental of the AV equipment with a vendor that is an entity related to the hotel or other establishment, the transaction may be treated as a separate sale of tangible personal property by the related vendor to the customer in certain instances.

In general, "a corporation will be recognized as having a separate taxable identity unless it is shown to have no legitimate business purpose either in its formation or its subsequent existence or that it is a sham or set up for tax avoidance" (Morris v. *New York State Department of Taxation and Finance*, 82 NY2d 135, 144-145 [1993], citing *Moline Properties, Inc. v Commissioner of Internal Revenue*, 319 US 436, 438-439). Whether the Tax Department recognizes a separate taxable identity for related entities is dependent on a variety of factors. These factors may include the use of common officers and directors, common offices and common telephone numbers between corporate entities. Consideration may also be given to factors such as the degree of overlap of personnel, the amount of business discretion displayed by the individual companies, whether the entities operate independently of each other, and whether one owns all or most of the stock or other interest in the other. Also significant is whether the entities trade under their own names and whether they hold themselves out to the public as separate and distinct businesses.

Assuming there is no evidence or indication that the affiliate (related entity) and the hotel or other establishment are the alter egos of each other or that they lacked a legitimate business purpose in their formation, the renting of the AV equipment to the customer by the related entity may not be a sale by the hotel or other establishment. See *Classe Catering LTD*, Adv Op St Tx Comm, December 15, 2008, TSB-A-09(51)S for additional details.

However, the affiliate (related entity) must be separately registered as a sales tax vendor and collect sales tax on its charge for providing the AV equipment to the customer.

Note, that this memorandum does not address situations where the customer pays the related entity for the rental of the AV equipment through the hotel's or other establishment's master account. This situation will be addressed on a case by case basis with the hotel or other establishment.

***Example 5:** Company A operates a banquet facility and its main business is selling food and drink to its customers at wedding receptions and other parties. Company B is in the business of renting AV equipment to customers for various types of events. Company A and Company B have the same ownership, but are separate legal entities that, among other things, maintain separate books and records, file separate tax returns and are separately registered for sales tax purposes. In addition, there is no evidence indicating that the business affairs of Company A and Company B are so comingled that it would cause a finding that they are alter egos of each other. In addition, the customers of Company A who desire to rent AV equipment for their event are not obligated to rent the equipment from Company B, nor are customers of Company B required to use Company A's facility for their event. If the customer opts to use another AV service, there is no change to any price charged by Company A.*

In this situation, Company B's purchases and rentals of AV equipment are considered purchases and rentals for resale and are not subject to sales tax. However, the charge for the rental of AV equipment by Company B to its customer is subject to sales tax.

The determination as to whether or not an affiliate and a hotel or other establishment are alter egos of each other or that the affiliate lacks a legitimate business purpose is based on very specific facts. Accordingly, taxpayers may wish to obtain an advisory opinion from the Tax Department. For more information on obtaining an advisory opinion, see TSB-M-08(8)S, *Changes in Procedures for Obtaining Guidance from the Tax Department*.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.