

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-13(15)S  
Sales Tax  
July 15, 2013

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110413B

Petitioner, [REDACTED], asks about its potential liability where, because of contractual requirements, an unrelated third party (Concessioner) collects and remits sales and use tax to the Department on Petitioner's behalf.

We conclude that Petitioner's agreement to allow another entity to collect tax means the parties are jointly and severally liable for the sales taxes on their collective receipts. Pursuant to §1101(b)(8)(ii)(A) of the Tax Law, Petitioner is liable for any tax not collected or remitted by the Concessioner. As for the various sales and purchases of prepared food, the issue of whether or not tax must be collected by the receiving entity generally depends on the extent to which the food is prepared for the purposes of §1105(d) of the Tax Law or, if not delivered in a heated state, the extent to which that entity, or a related entity of the Restaurant Group, participates in the service of the food to customers consuming the food.

**Facts**

The Petitioner is part of a larger group of related restaurant entities (Restaurant Group). An entity of the Restaurant Group related to the Petitioner previously requested an Advisory Opinion concerning food sales (and the provision of services by other entities of the Restaurant Group) to a third party Concessioner located at a sports Stadium. *See* TSB-A-10(12)S. That Advisory Opinion determined that the Restaurant Group had to collect and remit tax on its sales to the Concessioner of food and services related to that food, notwithstanding the fact the food was delivered to the Stadium in an unheated state. This determination was based upon the fact that employees of other entities of the Restaurant Group were providing services with respect to that food as it was served at the Stadium. TSB-A-10(12)S also determined that the Concessioner was eligible to take a credit for the tax it paid on such food and services on its own sales tax return.

The Petitioner of this Advisory Opinion is a food service entity related to the Petitioner in TSB-A-10(12)S. Petitioner states that, after the issuance of TSB-A-10(12)S, the Concessioner and the Restaurant Group significantly altered the terms of the contract at issue between the parties. Rather than operate all the food service locations at the Stadium, Concessioner has agreed to license the operation of those Stadium locations identifiable as being related to the Restaurant Group to the Petitioner. The actual lease to operate these locations from the Stadium is held by the Concessioner, and it has agreed to license (sublease) certain locations to Petitioner to operate. Due to the Concessioner's obligations to certain employees pursuant to a union contract, the Concessioner will remain the employer of the hourly staff (i.e. cashiers and servers)

working at these locations. Concessioner will generally retain the ability to hire and fire these employees pursuant to the same contract. Petitioner will employ management personnel at each location to oversee the quality of the food service, and the Restaurant Group will retain a say in the training and selection of the Concessioner's employees working at Petitioner's locations. Petitioner retains title to the food until it is sold. However, as part of its agreement with the Concessioner, Petitioner states that it has agreed to allow the Concessioner's employees to collect payments for food and beverage sales (both cash and credit card sales) "on its behalf" at these locations. The receipts from the food sales (including the tax receipts) will be deposited into a bank account controlled by the Concessioner. The Concessioner will file the appropriate sales tax returns with the Department remitting tax on both the food and beverage sales made at Petitioner's locations. Concessioner will also deduct from this account the payroll necessary to pay its employees working at Petitioner's locations, any item for which it is entitled to reimbursement under their contract, and its commission percentage. The balance of the remaining funds will be transferred to Petitioner's bank account within 28 days following the close of each of the Concessioner's accounting periods (i.e., its fiscal months) throughout the term of the contract.

Petitioner, as part of the Restaurant Group, is a disregarded entity for most Federal and State tax purposes. Its parent entity (Parent) files a consolidated Federal income tax return.

As described in TSB-A-10(12)S, Related Entity generally sells unheated prepared food to Petitioner so that Petitioner may sell the food at its food service locations at the Stadium. This includes prepared food items that are bagged or placed in quart containers (bulk) and are chilled. Most of the food items will have to be reheated before being served at the Stadium by the Concessioner's staff; a few items will have to be cooked. A small number of items are cold and are served cold at the Stadium. Other items prepared by the Related Entity require a bit more preparation before being served. An example is smoked meats that the Related Entity prepares. It will cook ham and pastrami and send them to the Petitioner in a chilled state. Petitioner will slice the meat and use it in making sandwiches at that location. The sandwiches are sold to customers at Petitioner's food locations at the Stadium by the Concessioner's staff, and these employees collect all of the receipts (including tax) from the customer. The Related Entity sells these items to Petitioner at cost (the cost of the food preparation plus travel costs). Petitioner's staff oversees the overall quality of service provided by Concessioner's employees as they serve food to the customers.

## **Analysis**

Petitioner asks the following questions:

Q. 1. If the Petitioner enters into a contract with the Concessioner that allows the Concessioner to collect and remit to the Department the sales tax it collects on Petitioner's behalf, will the Petitioner also be responsible for remitting the sales tax receipts to the Department? What will the Petitioner's liability be if the Concessioner fails to remit timely, accurate sales tax returns?

A. A person required to collect tax may not contract or assign that duty to another party. *Matter of Edward Yager and Patrick McKeon d/b/a California Brew Haus*, TAT (March 23, 1989). As part of its agreement with the Concessioner, Petitioner states that it has agreed to allow the Concessioner's employees to collect payments for food and beverage sales on its behalf, and that Concessioner will remit the tax to the Department with its sales tax returns. The balance, after further reductions for amounts contractually owed to the Concessioner, is paid to the Petitioner. As a result, we conclude that the Petitioner and the Concessioner are co-vendors for the purposes of the Tax Law. *See Names in The News v. New York State Tax Commn*, 75 AD2d 145 (3d Dep't 1980); *Matter of Edward Yager and Patrick McKeon d/b/a California Brew Haus*, TAT (March 23, 1989); TSB-A-12(25)S. Petitioner and the Concessioner are therefore jointly liable for any sales tax due on the sales of food at the Stadium location. *See Jericho Boats of Smithtown, Inc. v. State Tax Commission*, 144 AD2d 163 (3d Dep't 1988); Tax Law §1101(b)(8)(ii)(A); 20 NYCRR §526.10(e)(2)(ii). This means that Petitioner will be liable for tax if the Concessioner fails to remit it to the Department. However, Petitioner is not required to remit tax on their joint sales if the Concessioner has reported and remitted the tax due. *See* TSB-A-02(16)S. Petitioner would be liable if the Concessioner is late with its return or otherwise fails to remit the correct amount of tax.

Q. 2. What steps should Petitioner take to prepare its books and records for audit? In particular, Petitioner is concerned that its business records will show taxable food and beverage sales without corresponding sales tax filings to the Department.

A. Every vendor operating as a co-vendor must also maintain the name, address, and sales tax identification number (if any) of its co-vendor. *See* 20 NYCRR §533.2(e)(2). There is no mechanism for Petitioner to report the tax collected by Concessioner on its own sales and use tax returns unless it also has the tax receipts to be paid over with the submitted return. However, because Petitioner remains liable for the payment of tax, Petitioner should take steps to ensure it receive copies of the sales tax returns submitted by the Concessioner, and confirm that all tax payments are accurate and timely made. *See* TSB-A-02(16)S ("Petitioners, however, would not be required to remit tax on these sales to the New York State Department of Taxation and Finance if the credit unions and dealerships report and remit the tax due in compliance with Article 28 of the Tax Law").

Q. 3. If Petitioner purchases prepared food in an unheated state from a related entity that the Petitioner serves in conjunction with the Concessioner at a food venue, may the Petitioner issue the Related Entity a resale certificate? If not, will the Petitioner have to pay tax on the sale of the charges made by the Related Entity for the cost of the food?

A. As discussed in TSB-A-10(12)S, Petitioner states that the contract between the Concessioner and Restaurant Group allows for Petitioner to oversee and provide services with respect to the food provided by the Related Entity as it is served at the Stadium. Because Related Entity provides food to the Petitioner in conjunction with the Restaurant Group's contract with the Concessioner, and employees of the Petitioner are providing services with respect to that food at the Stadium, Related Entity must collect and remit State and local sales taxes on the charges to the Petitioner for food delivered to the Stadium locations. *See* Tax

Law §1105(d)(i)(2). Petitioner may not issue the Related Entity a resale certificate. *See* 20 NYCRR §527.8(f)(2)(iv).

Q. 4. If the Related Entity is required to charge Petitioner sales tax, and Concessioner is remitting the tax and filing the sales tax return, how would Petitioner take the credit for sales tax paid to the Related Entity?

A. Section 1105(d) of the Tax Law does not provide for an exclusion from tax for sales of food and drink for resale. Thus, in general, all receipts from the sale of food and drink are subject to sales tax. However, if food and drink are purchased for resale, the tax paid by the seller may be taken as a credit against the tax which the seller is required to collect and remit on the subsequent sale. As noted above, Petitioner and the Concessioner are co-vendors and are jointly and severally liable for the tax required to be collected. *See* 20 NYCRR §527.8(i); *See* TSB-A-98(21)S; TSB-A-98(46)S; TSB-A-10(15)S. However, Petitioner retains title to the items until they are sold, and it is the entity that paid tax to the subsidiary that remitted tax to the Department. Since it paid tax to a person required to collect tax, Petitioner (as co-vendor) may seek a refund, or take a credit on its sales tax return for the tax it pays to the Related Entity. *See* Tax Law §1139; 20 NYCRR §527.8(f)(2)(iv).

DATED: July 15, 2013

/S/  
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DEBORAH R. LIEBMAN  
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.