

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

TSB-A-14(4)S  
Sales Tax  
January 27, 2014

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121211A

The Department of Taxation and Finance received a Petition for Advisory Opinion from the [REDACTED] (“Petitioner”), [REDACTED]. Petitioner asks whether the proceeds from the sale of tickets for dining events held by Petitioner are subject to sales tax. Petitioner also asks whether the inclusion of the term "Suggested Donation" on advertising and tickets for fundraising dinners affect the taxability of the charge for the event.

We conclude that the proceeds from the sale of tickets for dining events held by Petitioner are subject to sales tax. We further conclude that the inclusion of the term “Suggested Donation” on advertising and tickets for fundraising dinners does not, in and of itself, control whether the charge for the event would be subject to sales tax.

**Facts**

Petitioner is an organization exempt from sales tax in New York under Tax Law § 1116(a)(4). Petitioner exists to sustain the social vitality and cultural vibrancy of Italian Americans in its region. To sustain its facility and defray its expenses, Petitioner operates a banquet facility on the premises in the large ballroom and adjoining café. It rents the facility to outside users and collects and remits the required sales tax on charges for food and drink in connection with those rentals.

There are many dining events offered only to Petitioner’s members and their families to celebrate and preserve significant cultural and historic culinary traditions in the Italian community. Some events are open to the public. These events take place at Petitioner’s facility. Many of these events involve preparation and clean-up by volunteer members. Other events involve paid caterers. Petitioner charges for admission to these events. The frequency and theme of these events vary substantially throughout the year. Examples of events include: (1) a bi-weekly luncheon open to the public; (2) “Let's Dance” (held twice a year) during which dinner is served and a Disc Jockey or other performer is present for entertainment; (3) a celebration of St. Francis (“Saint Francisco”) which generally is attended by between 100 and 175 members or their family members, where a priest will attend and provide a benediction; (4) an annual "Spring Fling" event; and (5) an annual "Valentine Dinner Dance" event. There are also other annual events in support of particular cultural or religious purposes. Petitioner’s largest fund raising event starts on a Friday and goes through Sunday, and is attended by approximately 4,500 to 5,000 people who pay an admission charge of \$5.

## Analysis

With some exceptions not relevant here, sales tax is imposed on the receipts from every sale of food or drink sold in or by restaurants, taverns or other establishments, or by caterers. *See* Tax Law § 1105(d)(i)(1); 20 NYCRR § 527.8(a). Although most sales by entities specified in Tax Law § 1106(a) (e.g., government entities, certain educational and charitable institutions) are exempt from sales tax, sales by such entities of food or drink that are subject to tax under § 1105(d) are not exempt.

A restaurant, tavern, or other establishment includes any dining room, bar and barroom, cafeteria, snack bar, banquet room, or concession stand operated with a degree of regularity, frequency and continuity, as well as any place where sales are made through a temporary restaurant, tavern, or other establishment located on the same premises as persons required to collect tax. *See* NYCRR § 529.7(i)(3). That regulation includes two examples (numbers 7 and 12) that are relevant here. Example 7 states the following: “[a]n exempt organization occasionally holds a covered dish supper in its hall. The food is prepared and donated by the organization’s members. The organization charges \$2.00 for tickets to the supper. The \$2.00 charge is not taxable.” Example 12 states “[a]n exempt organization holds a monthly supper. The suppers are subject to tax.”

Petitioner asks whether the difference in taxability between examples 7 and 12 in the Regulation is due to: (A) the frequency of the events; (B) the fact that in the exempt scenario the members donate and cook the food; or (C) some other issue. Petitioner also asks whether the inclusion of the term "Suggested Donation" on advertising and tickets for fundraising dinners affect the taxability of the charge for the event.

Tax Department Publication 843 (December, 2009) gives several examples of what constitutes a sale in or by a restaurant, tavern or other establishment. The first example states as follows: An exempt organization occasionally holds dinners in its hall and charges \$10 for tickets. The organization holds no more than two dinners each year. Because of the infrequency of the events, the exempt organization is not considered to be operating a restaurant, tavern or other establishment, so the sales of the dinner tickets are exempt from sales tax.

Accordingly, holding two or fewer fund-raising dinners a year does not suffice to trigger the “regularity, frequency and continuity” standard, and thus, will not require an exempt organization such as Petitioner to collect sales and use tax. However, holding more than two such events a year might cause an exempt organization to qualify as a vendor for sales tax purposes and require it to collect tax, depending on the regularity and continuity with which the events are held.

Petitioner holds, at a minimum, 26 luncheons open to the public per year, as well as numerous other events for members or for members and the public. Due to the frequency, regularity and continuity of its events, the Petitioner is operating a restaurant, tavern or other establishment for purposes of Tax Law § 1116(b)(2) and, as such, must collect and remit sales

tax on the receipts from its sales of tickets to all events involving the sale of food and drink, whether those events are open to members only or to the public. It makes no difference whether Petitioner's employees prepare the food and drink, or members donate the food and drink used for the event.

Petitioner also has inquired whether admission based upon a "Suggested Donation" for an event would result in a different conclusion. The § 1105(d) tax is imposed on the "receipts" from the sale of food or drink by a tavern, restaurant or other establishment. Receipt is defined in part as "the charge for any service taxable under [Tax Law § 1101(b)(3)]." The inclusion of the term "Suggested Donation" does not, in and of itself, automatically lead to the conclusion that the charge for the event would not be subject to sales tax. The Department would consider all the facts and circumstances surrounding the event (such as advertising, invoices and whether amounts are listed as suggested donations or actual payments) in order to determine if the receipts were really suggested donations and not mandatory. *See, e.g.*, TSB-A-86(18(S) (receipts from voluntary donations for meals served in conjunction with certain religious activities found to be subject to sales tax). If, based upon the facts, the payments were found to be mandatory payments (i.e., an attendee would not be served food or drink without payment), the payments would constitute consideration for food and drink and therefore would constitute receipts subject to sales tax. In situations where receipt of the food and drink is implicitly free and any donation is completely voluntary, with the amount left up to the donor, the donated amounts would be exempt from sales tax.

DATED: January 27, 2014

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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.