

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

TSB-A-15(31)S
Sales Tax
July 16, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120522A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner asks whether it is a vendor responsible for collecting sales tax on the receipts for the sale of prepared meals that are delivered to customers and, if so, on what receipts must it collect sales tax. Petitioner also asks whether it may issue resale certificates to food vendors if it is determined that Petitioner is reselling the vendors' food services.

We conclude that Petitioner is providing a food service subject to sales and use tax under Tax Law § 1105(d). As such, it is required to register as a vendor for purposes of New York sales tax and obtain a certificate of authority. It must collect sales tax on all charges it bills to its customers except itemized gratuities that are paid over to employees. Petitioner is reselling food services subject to sales tax under Tax Law § 1105(d). However, it may not issue resale certificates to the vendors from whom it purchases these services for resale. It must pay sales tax to them and then take a credit for the sales tax paid on its sales and use tax returns.

Facts

Petitioner describes itself as providing a service that connects food service vendors such as restaurants, caterers and food trucks with businesses that are seeking to purchase meals (usually lunches) for their employees. After Petitioner is retained to provide services, it will interview the customer to determine what type of meals its employees might enjoy and identify potential problems such as employee food allergies.

Petitioner selects the food vendors that will provide the catered food to its business customers. Petitioner usually selects the foods that the vendors will provide to the customer for a given day. Petitioner makes these decisions based in part on what foods it believes the customer's employees would enjoy and in part on which foods vendors have the logistical capability of filling a food order. While the customer has as much input into the selection of the food provided as it wishes, customers rarely dictate the full details of a food order. In brief, part of Petitioner's service is its knowledge of the local food service industry, particularly of new restaurants and caterers and of food establishments serving relatively exotic cuisine.

Petitioner provides the customer with a weekly or monthly menu that identifies the food vendor that will provide catering on a given day and the foods that will be served on that day.

Cancellations of orders are made through Petitioner. Cancellation penalties may be imposed. If cancellation penalties are imposed, Petitioner remits cancellation penalties to the appropriate food vendor.

Petitioner's agreement with the customers purchasing food services does not indicate that Petitioner acts as agent of the customer in the purchase of food. The agreement states that the customer will "purchase catering through" Petitioner. The agreement obligates Petitioner to carry liability insurance. The customer may have to pay a fee if it cancels the agreement before the end of its term.

Petitioner bills a customer on a monthly basis for the food service. The invoice lists a single amount that includes the cost of food services purchased by Petitioner. Petitioner does not markup these purchases, but normally imposes an additional fee, which is negotiated with the customer, for providing its services. The customer remits payment to Petitioner and may do so by using a credit card, check or direct deposit.

Petitioner's invoice to its customer contains a space for the customer to include a tip. Petitioner does not impose any mandatory gratuity charges, nor do any of its food vendors impose such a charge. Petitioner remits all tips to the designated vendor.

Petitioner's customers have no contractual liability to the food vendors. The food vendors' contractual relationship is with Petitioner.

Petitioner enters a standard agreement with each food vendor with whom it does business. This agreement states that Petitioner "connects providers of catering . . . to buyers of catering." Petitioner places food orders with the vendors on a daily basis. An order will list the types and quantities of food and beverages to be delivered to a location on a certain day. While the order form lists the address for Petitioner's customer, the form does not identify Petitioner as agent of the customer.

Under Petitioner's agreement with a food vendor, a vendor's confirmation of the order constitutes a binding agreement to provide the menu exactly as enumerated on Petitioner's order form at the designated time, date, and location and for the vendor's listed menu prices.

Petitioner contacts the vendor on each day that the vendor has contracted to furnish catering services. If Petitioner does not receive confirmation from the vendor that it will provide the food service agreed upon for the day, it reserves the right to cancel the order without charge. If an order is canceled because of lack of a response from a food service vendor, Petitioner will make arrangements with another vendor for the provision of food service.

The food vendors charge Petitioner based on their menu prices for the food, plus any standard delivery or service charge that they impose. This amount is subject to several adjustments, including a fee due Petitioner that is a percent of the total vendor's retail charge.

Another adjustment is for the credit card merchant fee Petitioner must pay when a customer pays Petitioner by credit card. This expense is allocated on a pro rata basis to the food

vendors that provided the customer with the food or beverages covered by the bill paid by credit card. Other adjustments may be made to the bill to allow for issues with food orders.

Analysis

Tax Law § 1105(d)(i)(3) imposes sales tax on the receipts 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, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers 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 sold in an unheated state and are of a type commonly sold for consumption 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 food services being sold to Petitioner's customers come within the scope of this tax provision.

Petitioner is the vendor of the taxable food services sold to its customers. It has a direct contractual relationship with its customers who are the purchasers of the food services. In contrast, the vendors from whom Petitioner purchases food services have no contractual relationship with the customers and have no legal claim against the customers for the amounts owed by the customers for food services they purchase.

Petitioner is not acting as agent of the food vendors in the sale of their food services. Nor is it acting as agent of the customers in their purchase of the food services. To establish an agency relationship, there must be a manifestation that Petitioner consents to act on behalf of the customer, subject to its control, and that the customer authorizes the fiduciary relationship. *See, Matter of Hooper Holmes v Wetzler*, 152 AD2d 871, (3d Dept. 1989); *see also Custom Management Corp. v. New York State Tax Com'n*, 148 A.D.2d 919 (3d Dept. 1989). No manifestation of any agency exists in regard to Petitioner's relationship with its customers or the food vendors. Therefore, Petitioner is reselling food services.

Because Petitioner is selling taxable food services in New York, it is a vendor for purposes of Tax Law § 1101(b)(8). As such, it is required to obtain a certificate of authority from the Department. *See* Tax Law § 1134. Tax Law § 1132 requires a vendor of taxable food and beverages to collect sales tax on behalf of the State, and subdivision (c) of that section places the burden of proof on the vendor to show that any particular charge is not taxable.

The sales tax imposed by Tax Law § 1105(d) on the receipts for food services includes "in the amount of such receipts any cover, minimum, entertainment or *other charge* made to patrons or customers." (Emphasis added.) Petitioner's full charge for its food service is subject to sales tax. This would include any management or service fee that is included in the amount billed to a customer for food service. *See Matter of Stephen Gallagher, Inc.*, Tax Appeals Tribunal, August 3, 2000; *see also Custom Management Corp. supra*.

Petitioner's customers contract with Petitioner to purchase food service for a specified period of time and may be required to pay a fee to terminate the contract early. A customer may also have to pay a cancellation fee if it cancels a specific food order. Cancellation fees for food

service come within the ambit of the phrase “other charge” in Tax Law § 1105(d)(i). *Cf.* 20 NYCRR § 541.9(c)(1)(c). Because the Petitioner has an ongoing contractual relationship with its customers to provide food services, these cancellation fees are subject to sales tax as a component of the food service.

Sales Tax Regulation § 527.8(1) addresses the taxability of gratuities: Gratuities and service charges. Any charge, made to a customer, is taxable as a receipt from the sale of food or drink unless:

- (1) the charge is separately stated on the bill or invoice given to the customer;
- (2) the charge is specifically designated as a gratuity; and
- (3) all such monies received are paid over in total to employees.

Voluntary gratuities are always excluded from receipts subject to sales and use tax. Mandatory gratuities are excludable from taxable receipts if the three criteria of the regulation are satisfied. *See* TSB-M-09(13)S. Accordingly, Petitioner does not have to collect sales tax on any voluntary gratuities tendered by its customers. Moreover, Petitioner will not be required to collect sales tax on any mandatory gratuities, including those passed through from the vendors from whom it purchased food services for resale, that satisfy the criteria of the regulations.

For taxable sales, Tax Law § 1132(a)(1) requires that sales tax on the price for a sale be stated, charged, and separately shown on the sales slip, invoice, receipt, etc. given the customer. Sales Tax Regulation § 532.1(b) elaborates on this statutory requirement:

- (1) Whenever the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, amusement charge, or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.
- (2) Whenever the sales and use tax is separately stated on such document, it may be referred to as tax.
- (3) The words “tax included” or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered.

Petitioner should separately state the sales tax on the invoice given to its customer. If Petitioner’s invoice does not include a separate charge for sales tax but merely includes in the base amount the sales tax paid by Petitioner on its purchase of the food services, Petitioner must collect sales tax on the total amount charged for the food services. *See* TSB-A-2002(6)S. Thus, in the absence of a separate charge for sales tax on the invoice given to its customer, Petitioner must collect sales tax on the entire charge to the customer.

Sales Tax Regulation § 527.8(i) provides, in part:

Resale. (1) Any person purchasing food or drink for resale as such is required to pay tax thereon at the time of purchase.

(2) When the food or drink is subsequently resold, the seller is required to collect tax from the purchaser.

(3) 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. The credit is limited to the amount of tax actually paid on the purchase by the seller of the food and drink resold.

Petitioner may not use a resale certificate to purchase prepared food and drink for resale; it must pay sales tax to its supplier at the time of purchase. However, Petitioner may take a credit on its sales tax return for the tax paid on such prepared food and drink.

DATED: July 16, 2015

/S/

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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.