

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

TSB-A-92 (63) S
Sales Tax
August 18, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920529A

On May 29, 1992 a Petition for Advisory Opinion was received from John Piccolo Catering, Inc., P.O. Box 379, Saratoga, New York 12866.

The issue raised by Petitioner, John Piccolo Catering, Inc., is whether the "service charge" imposed by it in connection with its banquet and catering business is subject to sales tax.

Petitioner operates a banquet and catering business in Saratoga Springs, New York.

Petitioner's service charges are clearly and separately stated on each invoice. The customer is informed prior to the event of such charges.

Petitioner's service policy is to recoup the service cost for an event. It is not its intention to make any profit on the stated service charge. The amount collected is paid to the statutory employees hired specifically for the event. These employees include waitstaff, bartenders, bus persons and other support staff who are hired for the event. No one included in the above group is salaried. If there is no event, the people earn no wages.

Occasionally Petitioner has an event which is a station type event. This requires cooks to prepare the food outside the kitchen and to serve it directly to guests attending the event. Wages of salaried cooks, as well as other salaried personnel, are not considered in computing the stated service charge.

Petitioner does not include on the invoice any designation relating to gratuities. Any gratuity received by an employee and reported, is recorded for Social Security purposes only.

Petitioner's banquet and catering menu describes its service charge as follows:

"2. Service Charge: An 18% charge is added to your invoice for service. This charge covers set up and breakdown service, kitchen service, floor personnel and supervision. This is not a gratuity but encompasses all service costs." (Emphasis supplied)

Section 527.8(1) of the Sales and Use Tax Regulations states:

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;

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(2) the charge is specifically designated as a gratuity; and

(3) all such monies received are paid over in total to employees.

Section 1101(b)(3) of the Tax Law defines receipt as: "The amount of the sale price of any property and the charge for any service taxable under this article without any deduction for expenses ..."

In order to be exempt as a gratuity, the charge for same such must meet all three of the conditions set forth in Section 527.8(1) of the Sales and Use Tax Regulations. Petitioner's charge is not specifically designated a gratuity and thus fails to meet the second condition. This is evidenced by the fact that petitioner's own menu states that the "service charge" is not a gratuity. In addition, Petitioner's employees receive no remuneration other than the service charge and therefore the service charge is actually the employees' wages and not gratuities. Section 1101(b)(3) of the Tax Law does not allow a deduction for wages when calculating the receipt subject to tax. Accordingly, Petitioner's "service charge" is a part of its receipts subject to sales tax.

DATED: August 18, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.