

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

TSB-A-96 (28)S
Sales Tax
May 2, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960222A

On February 22, 1996, a Petition for Advisory Opinion was received from Horizontal Boogie Bar, Inc. D/B/A The Water Street Music Hall, 204 North Water Street, Rochester, New York 14604.

The issue raised by Petitioner, Horizontal Boogie Bar, Inc. D/B/A The Water Street Music Hall, is whether a venue owned by Petitioner, is a roof garden, cabaret or other similar place as defined by section 1101(d)(12) of the Tax Law.

The venue ("The Water Street Music Hall") will host live musical performances, i.e., concerts. The performers will be touring musicians. The Water Street Music Hall has a capacity of 1,000 persons.

Concert tickets will be sold in advance, at the box office on the night of the show, or both. Advance tickets will be sold through "Ticketmaster". Tickets will name the performer and the date and time of the concert and will only be valid for that concert. No one will be admitted without a ticket.

The doors will open roughly one hour before the concert starts, or around 8:00 p.m. Given the size of The Water Street Music Hall, it is expected that it will take roughly an hour for the 1,000 ticket holders to pass through the doors in an orderly manner. The opening act will take the stage around 9:00 p.m. and perform for 45 minutes. The opening act will be followed by a 30-minute intermission to set up the stage for the headliner, and the headliner will then take the stage. The headliner will perform until close to midnight. Once the concert is over, the lights will be turned on, the clean-up crew will begin work, and the patrons will begin filing out.

The Water Street Music Hall will only open when a concert is scheduled. If there is no concert, The Water Street Music Hall will be closed. The Water Street Music Hall's concert schedule will vary with the schedule of concert tours. During the concert season (typically the winter months), The Water Street Music Hall will be open 3 to 4 times a week. Off-season, The Water Street Music Hall will be open less often. Over the course of a calendar year, The Water Street Music Hall will be "dark" over one-half of the time.

Physically, The Water Street Music Hall consists of a stage, dressing rooms, viewing areas, a front foyer, and a bar located along one wall. There is no seating in The Water Street Music Hall, and no tables. The total square footage of usable space in The Water Street Music Hall is roughly 15,000 square feet. The viewing areas are in two levels: stage-level, and a balcony. Collectively, the viewing areas account for roughly 8,900 square feet (4,900 square feet at stage level,

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and 4,000 square feet in the balcony). The stage area takes up roughly 1,750 square feet. Dressing rooms for performers (with private bathroom) take up 400 square feet. The front entrance room and bathrooms take up 2,500 square feet. The balance, or 1,450 square feet, consists of the bar and bar area.

When the concert given is of the kind where elderly clientele can be expected in large numbers, The Water Street Music Hall will place roughly 250 folding chairs in rows auditorium style (with a center aisle) in the main viewing area to accommodate people who cannot stand for an entire concert.

The bar is located along one wall. The aisle behind the bar and the bar itself take up roughly 725 square feet. In front of the bar, there is an eight foot area making up an additional 725 square feet (the "bar area"). The bar area is delineated from the viewing areas by a series of wall-to-ceiling posts joined together by a waist-height railing. All told, the bar and bar area will make up a little less than 10% of the usable floor space at The Water Street Music Hall.

Refreshments are sold separately from the concert ticket, i.e., it will be a cash bar. Both alcoholic and non-alcoholic beverages will be available. No "drink minimum" will be imposed. The Water Street Music Hall has no kitchen and no food of any kind will be available. It is expected that, on average, one third (33.3%) of The Water Street Music Hall's total revenues for each concert will come from beverage sales.

When a concert date is confirmed, The Water Street Music Hall will place advertisements in local newspapers soliciting ticket sales. The name of the performer will be prominently displayed. The advertisements will not indicate that beverages will be available for sale. The Water Street Music Hall will collect and remit sales tax on all sales of beverages made on the premises.

Section 1101(d)(12) of the Tax Law defines a "roof garden, cabaret or other similar place" as follows:

(12) Roof garden, cabaret or other similar place. Any roof garden, cabaret or other similar place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances.

Section 1105(f)(1) of the Tax Law imposes sales tax upon "[A]ny admission charge..., to or for the use of any place of amusement in the State, except charges for admission to ... dramatic or musical arts performances

Section 1105 (f) (3) of the Tax Law imposes a sales tax upon" [T]he amount paid as charges of a roof garden, cabaret or other similar place in the state."

Inasmuch as The Water Street Music Hall provides public performances for profit in conjunction with the selling of refreshments, The Water Street Music Hall will fall within the definition of "roof garden, cabaret or other similar place" unless it is demonstrated that its sale of refreshments is merely incidental to the performances.

The tax imposed pursuant to section 1105(f)(3) of the Tax Law is derived from the former federal excise tax on cabaret charges. IRC §4231. Thus, the numerous federal court decisions on this topic provide considerable illumination in determining when the sale of food and refreshments is merely incidental.

There is no simple test to determine when the sale of food and refreshments is merely incidental. Stevens v. United States, 302 F.2d 158, 164. Clearly, the amount of receipts attributable to the sale of food and refreshments as a percentage of total receipts has been viewed by the courts as the single most important factor in making this determination. Stevens v. United States, *supra*.

In some situations, the percentage of receipts attributable to the sale of food and refreshments may be so great or so small that this factor alone will be sufficient to determine whether such sales are merely incidental. Ross v. Hayes, 337 F.2d 690, 692. In other situations, other factors must be considered as well, including the amount of space devoted to the relevant activities, the nature and extent of food and refreshment services and the nature and hours of entertainment.

In determining whether the sale of food and refreshments is merely incidental, the courts have consistently held that the percentage of receipts from the sale of food and refreshments is the single most important factor. The courts have found the sale of food and refreshments to be more than merely incidental when the percentage of receipts from such sales ranged from 45.1%, Dance Town. U.S.A., Inc. v. United States 319 F. Supp. 634, to 74.7%, Roberto v. United States, 357 F. Supp 862, *aff'd* 518 F.2d 1109.

In the instant case, The Water Street Music Hall's expected revenues from the sale of refreshments will amount to 33.3% of its total revenues. Inasmuch as one-third of The Water Street Music Hall's revenues are from the sale of refreshments, the amount of these revenues is not low enough so that taxability may be determined based upon this factor alone.

The courts have consistently analyzed the facilities provided in an establishment to determine whether the preparation and consumption of food and refreshments plays a significant role in the operation of the establishment. Dance Town. U.S.A., Inc. v. United States, *supra*, Shutter v. United States, 406 F.2d 906, Luna v. Campbell, 302 F.2d 166, Billen v. United States, 273 F.2d 667.

As the percentage of space devoted to the preparation and consumption of food and refreshments (e.g. kitchen space, bars and tables and other areas suitable for dining) becomes greater in comparison to the percentage of space devoted to entertainment activities (e.g. band space, dance floor, stages and lighting facilities), it becomes more likely that the selling of food and refreshments is more than merely incidental.

In this case, The Water Street Music Hall consists of a stage, dressing rooms, viewing areas, a front foyer, and a bar along one wall. There is no seating in the Water Street Music Hall and no tables for patrons to sit. The area Petitioner has reserved for the preparation of refreshments amounts to less than 10% of the Water Street Music Hall's total area, while in the Ross case, the court found persuasive that less than 25% of the space at issue was devoted to these uses.

Where the sale of refreshments assumes importance as a significant attraction for its own sake, it is not merely incidental. Stevens v. United States, 302 F.2d at 163. The selection of foods and refreshments served, the method and extent of preparation of such foods and refreshments, the dining atmosphere created and extent of service available would all tend to indicate the extent to which such foods and refreshments serve as an attraction in their own right. For example, in Ross v. Hayes, 337 F.2d 690, the court concluded that the beer, soft drinks, ice, potato chips, pretzels, crackers, peanuts and chewing gum in question offered little or no attraction to the patrons of the establishment and, therefore, were merely incidental to the real attraction which was the dancing provided.

By way of contrast, the court noted in Dance Town. U.S.A.. Inc. v United States. supra at p. 636, that:

Without food and drink, plaintiff's customers, exhausted by their terpsichorean activities, may well not have lingered long upon the premises before seeking elsewhere an oasis at which to refresh and refuel. Dancetown's bar was thus not only an ample source of revenue in its own right, but a magnet that guaranteed the presence throughout the evening of many of plaintiff's customers and, we might add, kept them coming back.

The Water Street Music Hall serves no food, does not require a minimum drink charge and does not provide table service or seating for patrons.

The Water Street Music Hall is known for its ability to draw big name performers for its concerts. The concerts will be the only source of entertainment. The Water Street Music Hall will only be open on nights when concerts are held. Over the course of a calendar year, The Water Street Music Hall will be "dark" more than one-half of the time. The Water Street Music Hall will never open just to sell refreshments. When a concert is scheduled, The Water Street Music Hall will open only as far in advance of the concert to allow all patrons in the door and will close promptly after the concert is finished. Since there is no place to sit and relax, it is unlikely that people will frequent The Water Street Music Hall just to have a drink. People will certainly not be coming to eat since there is no food. The beverages served are an adjunct to the concerts.

Under all of the facts and circumstances presented, the selling of refreshments by The Water Street Music Hall is merely incidental to the presentation of concerts inasmuch as the average expected receipts from the sale of refreshments will amount to only 33.3% of the Water Street Music

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Hall's total revenues; facilities devoted to the preparation and consumption of refreshments make up less than 10% of The Water Street Music Hall's facility and the sale of refreshments does not assume importance as a significant attraction for its own sake. Additionally, The Water Street Music Hall does not charge a minimum drink charge, provides no table service or seating, and is open only on evenings of performances.

Accordingly, The Water Street Music Hall is not a "roof garden, cabaret or other similar place" within the meaning and intent of section 1101(d)(12) of the Tax Law and charges for admission to The Water Street Music Hall are not subject to sales tax under section 1105 (f)(3) of the Tax Law. Further, the tax imposed by section 1105 (f)(1) of the Tax Law does not apply to these charges since they are charges for admission to musical arts performances.

DATED: May 2, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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