

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-07(27)S
Sales Tax
October 19, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070213B

On February 13, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Thomas A. Walter, c/o Eldredge, Fox & Porretti, LLP, 25 North Street, Canandaigua, NY 14424-1023.

The issues raised by Petitioner, Thomas A. Walter, are:

- (1) Whether an allocation of the price for a sightseeing cruise between the price of the cruise and the price of a meal would allow the cruise portion to be exempt from sales tax and would subject the meal portion to sales tax.
- (2) Whether the allocation of the price between the price of the cruise and the price of the meal must be displayed to customers in order for the cruise portion to be exempt from tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner intends to provide lake cruises of approximately two hours in duration. On some cruises, lunch or dinner meals will be provided. Cruises that include meals will be sold for one price that entitles the customer to the sightseeing cruise and the meal. These cruises cannot be purchased without the meal, although the customer can forego the meal. In addition, those customers who wish to partake of a meal may call ahead and select their meal choices from the menu provided.

Petitioner would allocate the \$39.95 cruise price as \$22.95 for the meal and \$17.00 for the cruise. Petitioner is willing to post the allocation of the price between the cruise and the meal in a separate location on the dock or on the ship for the customer to view. Petitioner does not intend to provide the customers with actual cruise tickets.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . for a consideration, or any agreement therefore, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1105(d)(i) of the Tax Law imposes sales tax on:

The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or 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 (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

Section 527.8 of the Sales and Use Tax Regulations provides, in part:

(a) *Imposition.* Sales tax is imposed on the receipts, including any cover, minimum, entertainment or other charge, from every sale of beer, wine or other alcoholic beverages and food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers:

(1) in all instances where the sale is for consumption on the premises where sold;

* * *

(c) *Premises.* The term *premises* shall mean the total space and facilities in or on which the vendor conducts his business, including but not limited to... counter space, indoor or outdoor tables, chairs, benches and similar conveniences.

(d) *Consumption on premises.* The phrase *for consumption on the premises* shall mean that the food or drink sold may be consumed on the premises where the vendor conducts his business.

Opinion

Petitioner provides sightseeing cruises, with meals included on certain cruises. For the cruises that merely entail sightseeing activities with no food or beverage included, the charge is for an unenumerated service and, therefore, is not subject to sales tax. However, Petitioner sells

some cruises that include a meal. These cruises cannot be purchased without the meal. Unless food and drink is merely incidental to a cruise or the purchase of food and drink is optional, the charge for a cruise that includes a meal is subject to sales tax under section 1105(d) of the Tax Law even if the charges for the cruise and the food and drink are separately stated (see *Matter of Hunts Point Palace, Inc.*, State Tax Commission, June 19, 1986, TSB-H-86(138)S). Food and drink provided in connection with a cruise are incidental when they are ancillary to the cruise itself, where significant time and/or expense is not devoted to the preparation or serving of the food or drink, and no separate charge is made for the food and drink. (See *Klondike Cruises, Inc.*, Adv Op Comm T&F, July 29, 1998, TSB-A-98(46)S, which indicated that a simple box lunch was incidental to a yacht cruise.) Separately stated charges for food and drink to be consumed on the boat are subject to sales tax under section 1105(d) of the Tax Law.

Based on the facts in this Opinion, the meals provided by Petitioner are more than merely incidental to the cruise. Therefore, Petitioner's lunch and dinner cruises fall within the purview of the tax imposed by section 1105(d) of the Tax Law. Petitioner is operating a restaurant, tavern or similar establishment engaged in selling food and drink for consumption on the premises. Therefore, Petitioner's entire charge for its lunch and dinner cruises is subject to tax under section 1105(d) of the Tax Law. Therefore, any allocation of the price between the meal and the cruise is irrelevant. The total charge is taxable. Therefore, Issue 2 is moot.

DATED: October 19, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.