

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

TSB-A-08(51)S
Sales Tax
December 15, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060810A

On August 10, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Classe Catering, LTD, 2 Petra Lane, Albany, New York 12205. Petitioner, Classe Catering, LTD, provided additional information pertaining to the Petition on October 16, 2006.

The issue raised by Petitioner is whether it is proper for Petitioner's affiliate, Company A, to provide its vendors with a resale certificate when, as described below, Petitioner and Company A have the same customer and are working at the same event.

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

Petitioner is a full service catering company. Petitioner's affiliate, Company A, provides individuals and companies with various special event items such as tents, flowers, entertainment, etc.

Petitioner and Company A often have the same customers and work the same events. Customers may separately contract with Petitioner and Company A. Petitioner and Company A are each free to contract with customers who do not contract with the other. Customers are billed separately by Petitioner and Company A for their respective services. Company A charges the sales tax due on all its sales unless it receives a properly executed resale or exempt certificate. Company A provides its vendors with resale certificates for items such as flowers, tents, entertainment, etc., and charges sales tax on its bills to its customers.

Petitioner and Company A have the same ownership but are separate legal entities that maintain separate books and records and file separate income tax returns and have separate sales tax registrations.

Applicable law and regulations

Section 1101(b)(4) of the Tax Law provides, in part:

Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually

transferred to the purchaser of the service in conjunction with the performance of the service subject to tax....

Section 1105(d)(i) of the Tax Law provides, in part:

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;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; . . .

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe . . . the sale shall be deemed a taxable sale at retail....

Section 527.8 (f)(2)(i) of the Sales and Use Tax Regulations provides:

Self-use. Taxable tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to tax. Examples of such taxable property are: tables, tents, chairs, bars, linens, napkins, silverware, glassware, chinaware, serving utensils, table covers, ice used to chill food or drinks before serving, as well as floral arrangements not purchased in accordance with the conditions set forth in subparagraph (v) of this paragraph.

Opinion

Petitioner is a full service catering company. As a caterer, Petitioner is subject to tax on its purchases for use in providing catering services and must collect sales tax on its sales of such service under section 1105(d) of the Tax Law. See section 527.8(f)(2) of the Sales and Use Tax Regulations.

Thus, to the extent that Petitioner, in providing catering services to a customer, utilizes the services or property of Company A in the provision of such catering services to customers, Petitioner would be required to pay sales tax on its purchases from Company A. Petitioner must collect tax from its customers on its total receipts for the sale of its catering services (including the charges for property or services provided to Petitioner by Company A). See *Matter of Elegant Affairs, Inc.*, Det Tax App Trib, March 13, 2008, DTA Nos. 820599, 820600, 820601.

Petitioner and Company A are related companies. The status of related companies as separate entities may be disregarded in situations where one company so dominates and controls the affairs of the other that one is merely an instrumentality of the other. In such situations, an entity may be considered to be the alter ego of the related company. Indicia such as common officers and directors, common offices and common telephone numbers between corporate entities are relevant though not necessarily sufficient by themselves to show that one entity is the alter ego of another. Consideration is also given to factors such as the degree of overlap of personnel, the amount of business discretion displayed by the individual companies, whether the entities operate independently of each other, or whether one owns all or most of the stock (or other interest in) the other. Also significant is whether the entities trade under their own names and whether they hold themselves out to the public as separate and distinct businesses. See *Harfred Operating Corporation*, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S; *Spencer Gifts, Inc.*, Adv Op St Tx Comm, September 18, 1986, TSB-A-86(37)S; *Levitz Furniture Co. of the Eastern Region, Inc.*, Adv Op St Tx Comm, September 18, 1986, TSB-A-86(38)S. Petitioner and Company A have the same ownership but maintain separate books and records, file separate income tax returns and have separate sales tax registrations. Though Petitioner and Company A often have the same customers and work the same events, customers may separately contract with Petitioner and Company A. Similarly, Petitioner and Company A are each free to separately contract with customers who do not contract with the other company. It would appear, therefore, based on the facts provided in this Opinion, that Petitioner and Company A are separate entities and that one is not the alter ego of the other.

The Tax Appeals Tribunal in its decision in *Matter of Elegant Affairs, Inc.*, *supra*, specifically noted the lack of any evidence that the petitioner was engaged in a separate business of renting equipment except as a component of its catering business. Company A, by contrast, does not sell food, is not a caterer as contemplated by section 1105(d)(i)(2) of the Tax Law, and does not bill its customers for catering services. It appears from the facts in this Opinion that Company A is in a separate business of selling services such as entertainment and selling or renting tangible personal property such as tents, flowers, and other items. Where both Petitioner

TSB-A-08(51)S
Sales Tax
December 15, 2008

and Company A are providing services at the same event, Company A's charges to its customers for its property and services are separate, distinct and independent of Petitioner's charges to the customer for catering services. When Company A bills its customers for items that are subject to sales tax, it must collect the sales tax from its customer. As a vendor of taxable goods or services, Company A may make purchases of tangible personal property or taxable services exclusively for resale without payment of sales tax. See section 1101(b)(4)(i) of the Tax Law. Company A should provide its vendors with a properly completed *Resale Certificate* (Form ST-120) in order to relieve those vendors of their obligation to collect sales tax on their sales to Company A. See section 1132(c)(1) of the Tax Law.

The above analysis presumes treatment of Company A as a separate legal entity. However, if the activities of Company A were so dominated and controlled by Petitioner or their activities were so commingled that they would be considered to be operating as alter egos of each other rather than separate legal entities, then the corporate structures would be disregarded and the conclusions reached in this Opinion would not apply. See *Harfred Operating Corporation, supra*.

DATED: December 15, 2008

/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.