

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

TSB-A-87(20)S
Sales Tax
May 14, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S870204B

On February 4, 1987, a Petition for Advisory Opinion was received from Festive Caterers Inc., 765 Horseblock Road, Farmingville, New York 11738.

The issue raised is whether Petitioner is liable for payment of sales tax on purchases of various supplies such as paper cups, napkins, table cloths and plastic tableware.

Petitioner maintains its purchases of these items should be exempt from taxation because they become part of a customer's order and are therefore bought for resale.

Articles 28 and 29 of the Tax Law impose sales tax on the receipts from every retail sale, except for resale, of tangible personal property (1105[a]) and on the receipts from every sale of food and drink by caterers including any cover, minimum, entertainment and other charge made to customers (1105 [d]).

Section 1101(b)(4)(i) of the Tax Law defines "retail sale" as a sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as physical component part of tangible personal property; or (B) for use by that person in performing certain services subject to tax under subdivision (c) of section 1105 of the Tax Law.

Section 1115(a)(19) of the Tax Law exempts from tax the receipts from retail sales of "cartons, containers and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser."

Regulation Section 528.20(d) provides that

(1) . . . cups, plates and containers for hot and cold drinks purchased for resale as a container of food or drink of any nature taxed under section 1105(d) of the Tax Law and actually transferred to the purchaser of such food or drink, are purchased for resale and thus not subject to sales or use taxes.

(i) . . . [P]ackaging materials which may be purchased under the resale exclusion of the Tax Law [include, but are not limited to]

- (a) sandwich wrappers;
- (b) cups and lids;
- (c) food sleeves;
- (d) disposable plates; and
- (e) paper bags.

TSB-A-87(20)S
Sales Tax
May 14, 1987

Consequently, wrapping material and nonreturnable food and drink containers which Petitioner will transfer to the customer may be bought exempt from tax if the supplier is given a Resale Certificate (Form ST-120) in proper form.

Regulation Section 528.20(d) further explains:

- (2) Napkins, straws, stirrers, plastic knives, forks, spoons and other similar items are not purchased for resale as such, nor are they packaging materials or supplies . . . exempted from tax by paragraph (19) of section 1115(a) of the Tax Law. . . .

The latter supplies and utensils are acquired for the Petitioner's use in providing a catering service pursuant to Tax Law 1105(d) and, even though their cost becomes a factor in determining the price a customer pays, are not considered to be resold "as such or as a physical component part of tangible personal property". Thus, these supplies do not qualify for the exclusion from taxation contained in Tax Law 1101(b)(4)(i) under (A), (see above). (See also Celestial Food of Massapequa Corp. v. State Tax Commission, 484 NYS2d 509). Furthermore, subparagraph (i)(B) of the exclusionary provision quoted above, is inapplicable to property bought for use in performing the transactions taxed under Section 1105(d) of the Tax Law.

Accordingly, Petitioner must pay sales tax on purchases of supplies which are not used for packaging food and drink, since such items are purchased "at retail" as defined in Tax Law 1101(b)(1). Additionally, Petitioner must collect tax on the total selling price charged to its customers (except for gratuities as defined in 20 NYCRR 527.8[l]) for catering services. Tax Law 1101(b)3; 1105(d), supra.

DATED: May 14, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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