

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

TSB-A-95 (39)S
Sales Tax
October 10, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950323B

On March 23, 1995, a Petition for Advisory Opinion was received from Ambassador Food Services Corporation, 3269 Roanoke Road, Kansas City, Missouri 64111.

The issues raised by Petitioner, Ambassador Food Services Corporation, are:

1. Whether its sales of meals to its client are exempt as sales for resale.
2. Whether, if such sales are not exempt sales for resale, the portion of the charge which relates to food preparation, transportation, management services and nutritional analysis is exempt from tax as a professional fee, so that only the portion relating to supplies and raw materials is subject to tax.

Petitioner provides food products to its client which operates a facility to provide medical treatment to patients with substance abuse problems. Petitioner's client is a for profit corporation which houses patients during treatment, provides meals including special diets, and bills patients a daily rate for its services. There is no written contract between Petitioner and its client. Patients of Petitioner's client receive three meals each day at the facility. Two of the daily meals are prepared at Petitioner's commissary and transported to the client's facility. The other meal is prepared and served at the client's facility by Petitioner's employees. Petitioner provides, and bills its client for, cold meals, hot meals, bulk food, on-site labor, supplies, nutritional analysis and management services. Petitioner's client in turn charges daily fees for patients (which include the cost of meals) to insurance carriers, including Medicaid.

Section 1105(d)(i) of the Tax Law imposes a tax upon:

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; and

(3) in those instances where the sale is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

In an analogous situation relating to meals provided to employees. Section 527.8(k) of the Sales and Use Tax Regulations provides:

(k) Subsidized employee cafeterias and food service operations.

(1) An employer who by contract or otherwise engages a caterer or food service contractor to provide food and drink or service to employees at the employer's expense is the purchaser of food and drink subject to the sales tax.

Example 1: Employer E provides food and drink to his employees without charge. E contracts with a food service contractor F to prepare and serve the food and drink for a fee to be paid by E. The fee paid by E is subject to tax as a receipt from the sale of food and drink.

(2) Sales of food, drink or service to employees through a cafeteria on an employer's premises are subject to the sales tax.

Example 2: Employer E maintains a cafeteria or restaurant on his premises for the purpose of selling food and drink to his employees. The sale of the food and drink to the employees is taxable.

(3) When the employer subsidizes the caterer or food service contractor, such subsidy, regardless of whether it is called a management fee, guarantee of profit or some other designation, is taxed as a receipt from the sale of food and drink.

Example 3: Caterer C agrees to charge employer E's employees a scheduled amount for each item of food and drink it sells to them. E agrees to pay caterer C an amount, in addition to the employees' payments, which would guarantee a 12 1/2 percent profit from the sales to the employees. The amount paid by E to the caterer is a taxable receipt from the sale of food and drink.

Example 4: Employer E enters into an agreement with caterer C. The agreement provides that C prepare, serve and sell food and drink to E's employees at a price mutually agreed to and in addition, E will pay a subsidy to C for operating the facility. The subsidy will be in such an

amount to allow C to make a profit on its sales of food and drink to the employees. However, if C's profits from the sale of food and drink exceed a set figure, C and E will share the excess profits in an agreed apportionment.

Irrespective of the profit sharing agreement, the subsidy paid by E is considered to be a receipt from the sale of food and drink.

(4) If a subsidy is paid by an employer in addition to a specified amount paid by the employee, both amounts are taxed as the receipt from the sale of food and drink.

Example 5: Employer E will pay 50 cents to a caterer for each sale of food and drink to E's employees. E's employees will pay any amount due which exceeds the 50 cents paid by E. Both the amount paid by the employee and the 50 cents paid by E are taxable receipts from the sale of food and drink.

(5) The caterer or food service contractor is a vendor required to collect the tax on receipts from either the employee, employer or both.

In the instant case, Petitioner provides food products to its client while acting as a food service contractor for its client. Petitioner's receipts from the sale of such food products are subject to tax under Section 1105(d)(i) of the Tax Law as receipts from the sale of food and drink. See section 527.8(k)(1) of the Sales and Use Tax Regulations. Section 1105(d) does not provide for an exclusion from tax for sales of food and drink for resale. Petitioner's meal charges to its client, therefore, cannot be deemed to be sales for resale.

Section 527.8(k)(3) of the Sales and Use Tax Regulations provides that the subsidy received by a food service contractor from an employer which provides meals to its employees, regardless of whether such subsidy is called a management fee, guarantee of profit or some other designation, is taxed as a receipt from the sale of food and drink. See Stouffer Management Food Service, Inc. v. Tully, 98 Misc 2d 1128, affd without opn 69 AD2d 1023, mot for lv to app den 47 NY2d 709. In the management of the food service system for its client, Petitioner runs the entire operation. Petitioner orders the food and supplies, prepares the meals, and provides nutritional analysis, on-site labor by its own employees and other unspecified management services. In sum, the essence of Petitioner's service to its client is to operate the food service facility for the client. Petitioner's provision of food service at the client's facility is analogous to the operation of the facilities held subject to tax by Section 527.8(k) of the Sales and Use Tax Regulations. Petitioner's situation differs only in that instead of providing food services subsidized by an employer for its employees as set forth in the Regulations, Petitioner provides food services subsidized by a health care facility for its patients. See ARA Services, Inc., Adv Op Comm of T & F, October 28, 1991, TSB-A-91(68)S. The management fee and other cost reimbursements that may be paid to the petitioner by the client to

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provide such food service for the client will be subject to sales tax, therefore, as receipts from the sale of food and drink.

DATED: October 10, 1995

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.²