

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

TSB-A-96 (9)S
Sales Tax
February 22, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950125A

On January 25, 1995, a Petition for Advisory Opinion was received from Empire Management and Productions, Inc, 6 Crannell Street, Poughkeepsie, New York 12601.

The issue raised by Petitioner, Empire Management and Productions, Inc., is whether the charges for admission to Petitioner's establishment to listen and/or dance to a live band are subject to the sales tax.

Petitioner had originally raised an additional issue of whether it is liable for any sales tax due on the charges if it engages a professional booking agent to collect them from patrons. Subsequently, Petitioner stated that it is no longer using a booking agent. This additional issue, therefore, is not addressed by this Advisory Opinion.

According to its submission, Petitioner intends to own and operate an establishment which engages in the following activities:

- 1) selling alcoholic beverages from its bar;
- 2) charging a fee for the use of its facilities where people can listen to a local band (booked by Petitioner) and dance to the music; and
- 3) booking national popular musical groups on selected occasions. (These musical groups perform a concert and an admission fee is charged at the box office to those who wish to listen to the performance. People will sometimes dance to the concert music and although dancing is not encouraged, traditionally it is not discouraged or prevented.)

The establishment is in the nature of a concert hall, and dates back to 1912. It has been providing live shows since 1980. It has been converted so that there are seating arrangements including tables for patrons. A bar is on one level of the theater. The original stage remains, as well as many mementos of the 1912 era.

The bar is not open during the week. It is only open on concert dates, and recently the company has promoted a dance night which features a disc jockey who takes requests. Drinks are served during performances at tables with waitress service, or patrons can be served at the bar. Of the total receipts, 22% come from admission charges, and 78% come from the bar.

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 provides, in part, as follows:

(f)(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or 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."

Since Petitioner provides public performances for profit in conjunction with the selling of drinks, Petitioner's establishment falls within the definition of roof garden, cabaret or similar place" unless it is demonstrated that its sale of drinks is merely incidental to such 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). 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. 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 the 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.

SOURCES OF INCOME

As stated before, 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 those 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 this case, Petitioner's revenues from the sale of drinks from the bar amount to 78% of its total revenues. This percentage is higher than in any of the cases cited above where the federal cabaret tax was held to apply.

EXTENT OF DINING FACILITIES

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 floors, stages and lighting facilities), it becomes more likely that the selling of food and refreshments is more than merely incidental.

In this case, Petitioner's establishment has been converted to provide facilities for the consumption of drinks. Petitioner's establishment contains seating arrangements, including tables, for patrons and a bar on one level of the theater.

FOOD SERVICE

When 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 foods and refreshments, the dining atmosphere created and extent of service available would all tend to indicate the extent to which 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.

Petitioner serves no food but does provide seating at tables for patrons to be served drinks by waitresses, and a bar area for patrons to obtain drinks, during concert performances.

NATURE AND HOURS OF ENTERTAINMENT

The bar in Petitioner's establishment is generally only open on nights when concerts are held. Recently, however, Petitioner has promoted a dance night which features a disc jockey who takes requests.

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CONCLUSION Based upon the totality of Petitioner's facts and circumstances, it is concluded that the serving or selling of drinks in Petitioner's establishment is **not** merely incidental to the presentation of concerts. This conclusion is supported by the fact that receipts from the sale of drinks from the bar amount to 78% of the establishment's total receipts. In addition, Petitioner provides seating at tables for its patrons, where they are served drinks by waitresses during performances.

Accordingly, Petitioner's establishment is 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 Petitioner's cafe are subject to sales tax under section 1105(f)(3) of the Tax Law.

DATED: February 22, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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