

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

TSB-A-98(46)S
Sales Tax
July 29, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980227A

On February 27, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Klondike Cruises, Inc., 542 Second Avenue, Pelham, NY 10803. Petitioner, Klondike Cruises, Inc., provided additional information pertaining to the petition on April 1, 1997.

The issue raised by Petitioner is whether separately stated charges for the below listed services are subject to sales tax:

- (1) charges for the rental of its yacht for a specific period of time;
- (2) charges for the rental of its yacht and the per person charges for the serving of liquor aboard the yacht by Petitioner; or
- (3) charges for the rental of its yacht, the serving of liquor by Petitioner and the procurement by Petitioner of an outside caterer to cater meals aboard the yacht.

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

Petitioner operates a charter yachting business for the purpose of conducting yacht cruises in and around the Long Island Sound area. The captain of the yacht is one of the officers of Petitioner. While sailing, the boat is under the direction and control of Petitioner at all times. The route taken is determined by Petitioner and is followed strictly. Petitioner retains the responsibility for the operation of the boat and pays all operating expenses including insurance, tolls and fuels.

On some excursions, Petitioner serves liquor to its customers from a bar on board the boat which is charged on a per person basis and stated separately from the rental of the yacht on the invoice given to the customer. On other excursions, customers desiring to have food catered aboard the boat may ask Petitioner to make the necessary arrangements and retain a caterer. When so asked, Petitioner will engage and pay the caterer on behalf of the customer, passing on the catering charge to the customer as another separately stated item on the invoice. The customer also has the option of independently hiring its own caterer. In all cases, the caterer comes on board the boat to bring, prepare and serve the food.

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:

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* * *

(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(a) of the Tax Law imposes sales tax on the receipts from retail sales (including rentals) of tangible personal property.

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;

(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. . . .

(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 or condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

Section 526.7(e) of the Sales and Use Tax Regulations provides, in part:

(4) *Transfer of possession* with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

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;

(2) in those instances where the sale is for consumption off the premises and the vendor (or someone acting on behalf of the vendor) after delivery either serves or assists in serving, cooks, heats or provides services with respect to the food or drink. . .

* * *

(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.

(e) *Consumption off premises.* The phrase *for consumption off the premises* shall mean that the food, including sandwiches, or drink is intended to be consumed at a place away from the vendor's premises.

* * *

(f) *Caterers.* (1) Sales by caterers.

(i) All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable.

(ii) Sales of food or drink by caterers where the caterers merely deliver the items purchased and offer no other services after delivery are deemed to be sales for off-premises consumption and are taxable in accordance with the provisions of subdivision (a) of this section.

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(iii) Sales of food or drink by caterers where the caterers deliver the items purchased and arrange the food on platters or place the drink in containers so that food or drink is ready to serve guests are taxable.

* * *

(i) *Resale.* (1) Any person purchasing food or drink for resale as such is required to pay tax thereon at the time of purchase.

(2) When the food or drink is subsequently resold, the seller is required to collect tax from the purchaser.

(3) The tax paid by the seller may be taken as a credit against the tax which the seller is required to collect and remit on the subsequent sale. The credit is limited to the amount of tax actually paid on the purchase by the seller of the food and drink resold.

Technical Services Bureau Memorandum TSB-M-84(7)S, dated April 10, 1984, entitled Bus Company Transactions -- Transportation Service vs. Equipment Rental, provides, in part:

1. Where a bus company conducts a tour for which it determines the time and destination and sells tickets at a predetermined price, the company is providing a transportation service which is exempt.

2. Where a bus company charters a bus to a group, and the bus company retains dominion and control over the bus, the bus company is engaged in providing a transportation service and, therefore, the charges are exempt from sales tax. A chartering party's rights are limited to boarding the bus and riding to the agreed destination....

*Dominion and control remains with the owner of a vehicle when pursuant to an agreement or contract:

1. there is no transfer of possession, control and/or use of the vehicle during the terms of the agreement or contract; and

2. the owner maintains the right to hire and fire the drivers; and

3. the owner uses his own discretion in performing the service... and generally selects his own routes; and

4. the owner retains the responsibility for the operation of the vehicle; and

5. the owner directs the operation, pays all operating expenses, including drivers' wages, insurance, tolls and fuels.

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Opinion

Petitioner is predominantly engaged in providing the use of its yacht, including its service as a navigator, to paying customers for the purpose of sailing the waters in and around the Long Island Sound for a fixed period of time. Whether the chartering of a boat constitutes a taxable rental of tangible personal property rather than the furnishing of an exempt transportation service turns upon the question of dominion and control (see Henry F. Geerken, Adv Op Comm T&F, August 25, 1997, TSB-A-97(52)S).

While the provisions of TSB-M-84(7)S, supra, do not specifically apply to the chartering of a boat, the criteria set forth therein are useful in determining whether Petitioner has relinquished dominion and control of its boat within the meaning of Section 526.7(e) of the Sales and Use Tax Regulations (see Limousine Operators of Western New York, Inc., Adv Op Comm T&F, October 27, 1988, TSB-A-88(55)S; Henry F. Geerken, supra). In Petitioner's case, the chartering party's rights are limited to boarding the yacht and sailing a route selected and strictly followed by Petitioner. Petitioner retains possession of the boat, has the right to hire and fire any "drivers" should it choose to do so, uses its discretion in operating the boat, pays all operating expenses and retains the responsibility for the operation of the boat at all times. In fulfilling all of the requirements listed in TSB-M-84(7)S, supra, Petitioner is deemed to retain dominion and control over the boat and is thus providing a nontaxable transportation service to its passengers (see Morton L. Coren, P.C., Adv Op Comm T&F, April 25, 1995, TSB-A-95(13)S; Limousine Operators of Western New York, Inc., supra; Henry F. Geerken, supra).

With respect to the cruises on which Petitioner serves liquor from an open bar and/or acquires a catering service to provide food at the request of its customers, and charges them for the sale of food and drink, its activities fall within the purview of section 1105(d) of the Tax Law. In Matter of Hunts Point Palace, Inc., State Tax Commission, June 19, 1986, TSB-H-86(138)S, it was determined that the charge for the rental of a banquet room for a wedding, party or meeting, was an "other charge" to the customer when sold in conjunction with the sale of food and drink, and thus became part of the receipts subject to the tax imposed under Section 1105(d)(i) of the Tax Law. In Petitioner's case, in those instances where a customer has sole use of Petitioner's yacht and an open bar and/or catered food service is provided, the use of the yacht is equivalent to the rental of a banquet room. Therefore, unless the food and drink service is merely incidental to the yacht cruise, the charge for the use of the yacht is an element of such service and the total charge to the customer, including the charge for the cruise, is subject to tax (Hunts Point Palace, Inc., supra). Merely incidental food and drink charges are charges that would be considered ancillary to the cruise itself, e.g., the inclusion or other provision of a simple box lunch or beverage(s), where significant time and/or expense is not devoted to the preparation or serving of such food and/or beverage(s) (see Henry F. Geerken, supra). The inclusion of such incidental charges in the invoice to

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the customer would not make Petitioner's charge for the cruise taxable. Sales of food or drink to passengers from a cash bar, food stand or similar venue, the charges for which are in addition to the charge for the cruise, are subject to tax. For those cruises where the customer independently hires a third-party caterer, whether or not the caterer is an affiliate of Petitioner, Petitioner's charge for the cruise would not be subject to sales tax.

Section 1105(d) does not provide for an exclusion from tax for sales of food and drink for resale. All payments to a caterer are taxable as receipts from the sale of food and drink. For those cruises where Petitioner purchases the services of an outside caterer to cater meals aboard the yacht, Petitioner must pay tax to such caterer at the time of its purchase in accordance with Section 527.8(i) of the Sales and Use Tax Regulations. When the food and drink is subsequently resold, Petitioner is required to collect tax from its customers. However, Petitioner may take a credit on its sales tax return for the tax paid on such prepared food and drink (see UM Enterprises Ltd, Adv Op Comm T&F, March 24, 1998, TSB-A-98(21)S). For those cruises where Petitioner, acting as a caterer, serves liquor from an open bar aboard the yacht, the liquor (and ice served in drinks) may be purchased for resale. See Section 527.8(f)(2)(ii) of the Sales and Use Tax Regulations.

Additionally it is noted that the applicable rate of tax Petitioner is required to collect is the rate in effect in the locality of embarkation of its customers.

DATED: July 29, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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