

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

TSB-A-99(13)S
Sales Tax
March 1, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S981221A

On December 21, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from First Colony Company, 660 Albany-Shaker Road, Albany, New York, 12211.

The issues raised by Petitioner, First Colony Company, are as follows:

1) Whether items ordinarily sold by Petitioner that are offered on a complimentary basis as a customer inducement (e.g., complimentary cocktails at a reception for a conference) are subject to sales and compensating use tax.

2) Whether items ordinarily sold by Petitioner that are consumed by Petitioner (e.g., food and beverages consumed at staff meetings) are subject to sales and compensating use tax.

3) How are discount coupons given to customers with special promotional packages treated for purposes of calculating taxable receipts for sales tax purposes? For example, if a customer redeems a coupon for a discount on the price of a dinner, is the dinner taxable at the gross amount or the discounted amount?

4) Whether gift certificates given by Petitioner to customers who are not satisfied with Petitioner's service are subject to sales and compensating use tax.

5) Whether gift certificates donated by Petitioner to a charitable organization are subject to sales and compensating use tax upon redemption of the certificate at Petitioner's business by either the charitable organization or by someone who purchased the certificate from the charitable organization at auction.

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

Petitioner is a full service hotel providing overnight rooms, meeting rooms, restaurants, and gift shop, etc. Petitioner may sometimes offer complimentary drinks as a customer inducement. Typically, Petitioner will enter into a contract with a customer to provide its hotel facilities for a conference and Petitioner will provide complimentary food and beverages, including alcoholic beverages, at a reception for conference attendees as a separately stated part of the customer agreement. On other occasions, Petitioner may provide food and drink, at no charge, to employees at staff meetings.

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Petitioner offers discount coupons for meals to customers as part of special promotional packages. Petitioner also provides gift certificates in some instances. Petitioner may give a gift certificate for a free stay at Petitioner's hotel or for a free meal at Petitioner's restaurant to a dissatisfied customer. Gift certificates may be donated by Petitioner to a charitable organization.

Applicable Law and Regulations

Section 1101(b)(3) of the Tax Law defines the term "receipt" as:

The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. For special rules governing computation of receipts, see section eleven hundred eleven.

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such....

Section 1101(b)(5) of the Tax Law defines the terms "sale, selling or purchase" as:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law states in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(d)(i) 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;

* * *

(e) The rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (1) a permanent resident, or (2) where the rent is not more than at the rate of two dollars per day.

Section 1110 of the Tax Law provides, in part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail,...

* * *

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

Section 1116 of the Tax Law states in part:

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

* * *

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

Section 526.5 of the Sales and Use Tax Regulations states in part:

(a) Definition. The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

* * *

(c) *Coupons...*

* * *

(3) Where a store issues a coupon entitling a purchaser to a discounted price on the item purchased, and receives no reimbursement, the tax is due from the purchaser on only the discounted price, which is the actual receipt.

Example 3: A store issues coupons entitling the holder to credit allowance of 12 cents on the purchase of its products from a retailer. The purchaser is billed as follows by the retailer:

Regular price	63¢
Store coupon	12¢
	51¢
Tax at 7 percent rate	4¢
Amount due from purchaser	55¢

With respect to the resale exclusion, Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Opinion

Issue #1

Petitioner's serving of complimentary cocktails to its customers, where no payment is received by Petitioner for providing the cocktails, is not subject to the sales tax imposed by Section 1105(a) of the Tax Law. However, Petitioner's purchase of tangible personal property, such as alcoholic beverages and mixers, to produce the drinks would be subject to State and local sales or compensating use taxes. Assuming Petitioner furnished a resale certificate (Form ST-120) to its suppliers when it purchased such tangible personal property and did not pay sales tax on such purchase, Petitioner may use a reasonable method to determine the tax due.

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The more typical situation that Petitioner will encounter is where Petitioner enters into a contract with a customer to provide its hotel facilities for a conference and Petitioner provides food and beverages, including alcoholic beverages, at a reception for conference attendees, at no charge to the attendees, as a separately stated part of the customer agreement. In this situation, Petitioner's purchases of the food and beverages are considered purchases for resale as part of the sale of food and drink under the customer agreement. Therefore, Petitioner's purchases of such food and beverages would not be subject to sales tax (see UM Enterprises Ltd, Adv. Op Comm. T&F., March 24, 1998, TSB-A-98(21)S).

If Petitioner offers complimentary items in conjunction with an otherwise taxable sale of food or drink, e.g., a free bottle of wine offered with the purchase of a meal, the complimentary item is deemed to be purchased for resale provided that at least 100% of the costs, including labor costs and overhead, associated with furnishing the complimentary item in conjunction with the sale of other tangible personal property or with food and beverages is recovered in the selling price paid by the customer for such other tangible personal property or food and beverages.

Issue #2

Items that are used by Petitioner, such as food and beverages consumed at staff meetings (where the food and beverages are not income to the employees for federal or state income tax purposes), can not be purchased for resale. The purchase of such items by Petitioner would be a retail sale of tangible personal property to Petitioner. Therefore, purchases of such food and beverages and other items are subject to either sales or compensating use tax, provided that the food and beverages are not otherwise exempt under Section 1115(a)(1) of the Tax Law. Assuming Petitioner furnished a resale certificate (Form ST-120) to its suppliers when it purchased such food and beverages and did not pay sales tax on such purchase, Petitioner may use a reasonable method to determine the tax due.

Issue #3

When a customer of Petitioner makes a taxable purchase from Petitioner, using a discount coupon issued by Petitioner, the receipt subject to sales tax is the amount actually paid by the customer after deducting the value of the coupon, in accordance with Section 526.5(c)(3) of the Sales and Use Tax Regulations.

Issues #4 and #5

Gift certificates for a stated dollar amount, whether given away for no consideration or sold to a customer, are not subject to sales tax. When the gift certificate is redeemed, the sales tax is imposed if a taxable purchase is made. The customer uses the gift certificate as if it were cash to pay for his or her purchases. If the purchase is subject to tax, the customer must also pay the tax,

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whether from the proceeds of the gift certificate or with additional cash. Therefore, if a gift certificate is applied to the charge to rent a room in Petitioner's hotel or to the purchase price of a meal or drinks, sales tax would apply to such charges, in accordance with Section 1105(e) or 1105(d) of the Tax Law.

If such a gift certificate for a stated dollar amount were to be redeemed by a charitable organization exempt under Section 1116(a)(4) of the Tax Law for food and drink to be consumed by the organization, Petitioner's furnishing of such food and drink to the charitable organization would not be subject to sales or use tax. But, when a person who purchased the gift certificate from the charitable organization redeems the gift certificate for food and drink from Petitioner, such food and drink are subject to tax.

Petitioner may give a certificate for a free stay at Petitioner's hotel or for a free meal at Petitioner's restaurant to a dissatisfied customer or occupant. Assuming that Petitioner is not reimbursed by a third party for any portion of the value of the certificate, such a certificate would be similar to a store coupon and not a gift certificate as discussed above. Since the hotel occupancy or meal is free to the customer or occupant, no sales tax is due when the certificate is redeemed by the customer or occupant. If such a certificate for a free hotel stay or meal is donated to an exempt organization, no sales tax is due when the certificate is redeemed by the exempt organization or when it is redeemed by a person who purchased the certificate from the exempt organization at auction. In those cases where a customer redeems a certificate for a free meal, Petitioner is liable for sales or compensating use tax on its cost of taxable food, drink and other items served to such customer.

DATED: March 1, 1999

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

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