

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

TSB-A-99(16)S
Sales Tax
March 12, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980918A

On September 18, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Sunset Home of Utica, 118 Genesee Street, New Hartford, New York 13413. Petitioner, The Sunset Home of Utica, furnished additional information with respect to the Petition on November 9, 1998.

The issue raised by Petitioner is whether Petitioner is exempt from collecting and remitting sales tax in connection with the meals it prepares and provides to the residents of Sunset Wood Apartments (hereinafter the "Project").

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

Petitioner is a not-for-profit Corporation organized under the Laws of the State of New York, with recognition of exemption from Federal Income Tax pursuant to Section 501(c)(3) of the Internal Revenue Code and from sales tax on its purchases under Section 1116(a)(4) of the New York State Tax Law.

Founded in 1882, Petitioner was organized exclusively to provide housing and other humanitarian services to less fortunate members of the Utica community. Though Petitioner's various facilities and associations have improved greatly over the course of the past century, its mission has remained relatively unchanged. Its mission is to provide housing and other related services to elderly persons in the community, on a not-for-profit basis, such that Petitioner will continue to provide services for residents of the community who are otherwise unable to provide for themselves, to the extent of Petitioner's resources.

Petitioner has undertaken several fund raising endeavors in order to offset annual operating expenses, and to subsidize the delivery of services to its residents. These fund raising efforts have led to Petitioner's ability to fund development of the Project with equity in excess of \$800,000, thereby outfitting kitchen operations and reducing debt service on the Project through maturity of the Project's mortgaged indebtedness. As a result, Petitioner is able to offer its services to residents at monthly rates which are considerably less than market rates.

Since 1984, Petitioner has operated the Project, a 43 unit residential housing complex for the well elderly, specifically for persons 62 years of age or older. The Project has been developed to provide housing accommodations, common areas for resident gatherings, a group library, and more. Though each individual unit contains a private kitchen, the Project maintains its own fully

operational kitchen to provide meals for Project residents, insofar as many residents are incapable of consistently preparing meals for themselves. The meals prepared and provided are done so for the benefit of the residents only, and occasionally for resident guests. Petitioner's services in this regard are neither offered nor opened to the public.

Meals are provided for each resident, in a dining room, as a component of all services offered to Project residents. The Resident Agreement, which each resident must enter into with Petitioner, sets forth that a portion of the rental fee charged to residents is allocated to rent, a portion is allocated to housekeeping and a portion is allocated to meals. The meal portion of the monthly rental charge has been determined to be \$190.00 per resident. Residents, however, must pay \$969.70 per month whether or not they accept the meals provided. Meals are not provided for the staff. In addition, Petitioner does not receive a government subsidy for providing the meals to residents.

Applicable Laws and Regulations

Section 1105 of the Tax Law provides, 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:

* * *

(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 . . .

Section 1116(a) of the Tax Law provides, in part:

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 . . . purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .

Section 1116(b) of the Tax Law provides, in part:

Nothing in this section shall exempt:

* * *

(2) sales of food or drink in or by a restaurant, tavern or other establishment operated by an organization described in paragraph (1), paragraph (4), . . .of subdivision (a) of this section . . .unless the purchaser is an organization exempt under this section.

Section 529.7(i)(3) of the Sales and Use Tax Regulations provides:

Sales of food or drink in or by a restaurant, tavern, or other establishment operated by an exempt organization are subject to the sales tax, other than the sales exempt under section 1105(d)(ii) of the Tax Law described in subdivision (h) of section 527.8 of this Title, or where the purchaser is a person or organization exempt under this Part. A restaurant, tavern, or other establishment as used in this section includes any dining room, bar and barroom, or concession stand operated with a degree of regularity, frequency and continuity as well as any place where sales are made through a temporary restaurant, tavern, or other establishment located on the same premises as persons required to collect tax. It is immaterial whether or not the restaurant, tavern, or other establishment is located on the premises of the exempt organization or whether or not the use of such facilities is restricted to the members of the organization. (See section 527.8 of this Title for the application of tax on sales of food and drink.) . . .

Opinion

In this case, as a component of its exempt purposes of providing housing and other related services to the elderly residents of the Project, Petitioner provides meals for the residents. The meal portion of the monthly rental charge has been determined to be \$190.00 per resident. Residents, however, must pay \$969.70 per month whether or not they accept the meals provided. Meals are not provided for the staff. In addition, Petitioner does not receive a government subsidy for providing the meals to residents.

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In providing meals to the residents of the Project, Petitioner is operating a restaurant, tavern or other establishment within the meaning of Section 1116(b)(2) of the Tax Law and Section 529.7(i)(3) of the Sales and Use Tax Regulations. Therefore, Petitioner is required to collect and remit sales tax on the portion of the monthly rent paid by residents which is determined to be the cost of the meals.

DATED: March 12, 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.