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Directive 06-3: Catering Businesses

I. Introduction:

Generally, for sales/use tax purposes, catering businesses are considered restaurants and charges paid by their retail customers are subject to tax. A catering business may elect to separately state certain charges on the bill to its customer. The purpose of this Directive is to clarify which separately stated charges from catering businesses to their customers are subject to sales tax, and which are not subject to tax.

II. Directives:

Issue 1: What separately stated charges from a catering business to its customer in Massachusetts are subject to sales tax?

Directive 1: Generally, non-itemized charges from a catering business to its customer in Massachusetts are subject to sales tax. The following separately stated charges are also subject to tax.

- a. Charges directly relating to food or beverages being sold, including preparation, set-up at the customer's location, serving, bartending, and clean-up.
- b. Mandatory liquor liability or other insurance charges.
- c. Rental charges for tangible personal property such as linens, chairs, tables, dishware, and glasses.
- d. Tangible personal property sold to the customer such as candles, flowers, menus or decorations.
- e. Room rental charges where the room is rented for the purpose of serving a meal.

Issue 2: What separately stated charges from a catering business to its customer in Massachusetts are not subject to sales tax?

Directive 2: The following separately stated [\[1\]](#) charges from a catering business to its customer in Massachusetts are not subject to tax:

- a. Gratuities or tips that are distributed by a catering business to service employees, wait staff employees or service bartenders as provided in G.L. c. 149, § 152A.
- b. Optional charges for services unrelated to the preparation or serving of food or beverages sold by the caterer [\[2\]](#) such as valet parking or recorded or live musical entertainment.
- c. Delivery charges meeting the requirements of DD 04-5, Sales Tax on Transportation Charges. [\[3\]](#)

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III. Discussion:

Taxable Charges Directly Relating to Food and Beverages Sold

Massachusetts law imposes a five percent sales tax on all retail sales in Massachusetts, by any vendor, of tangible personal property or of services performed in Massachusetts, unless otherwise exempt under another provision of the law. G.L. c. 64H, § 2. A complementary use tax is imposed on tangible personal property purchased for storage, use or consumption in Massachusetts, unless otherwise exempt. G.L. c. 64I, § 2. In general, sales that are exempt from the sales tax under G.L. c. 64H are also exempt from use tax. See G.L. c. 64I, § 7(b).

Sales of "food products for human consumption" are exempt from sales tax. G.L. c. 64H, § 6(h). However, the definition of "food products" does not include "meals." *Id.* "Meals" are defined in part as "any food or beverage, or both, prepared for human consumption and provided by a restaurant, where the food or beverage is intended for consumption on or off the restaurant premises." *Id.* "Restaurant" is defined as "any eating establishment where food, food products or beverages are provided and for which a charge is made, including but not limited to a ... catering business ... and any other place or establishment where food or beverages are provided...." *Id.* "Caterer" is further defined as a person engaged in the business of preparing or serving meals, whether on the premises of the caterer, premises of the caterer's customers, or premises designated by the customers. 830 CMR 64H.6.5(5)(f)1.

The sales tax is calculated on the sales price of that meal. The sales price is the total amount paid by a purchaser to a vendor as consideration for the meal, valued in money or otherwise. The statutory definition of "sales price" includes "(i) any amount paid for any services that are a part of the sale; and (ii) any amount for which credit is given to the purchaser by the vendor." The sales price also generally includes the cost of the property sold, the cost of materials used, labor or service cost, interest charges, losses, or other expenses. See G.L. c. 64H, §§ 1, 2, 6; 830 CMR 64H.6.5(7). Taxable charges from a catering business to its customer in Massachusetts include all charges directly relating to food or beverages being sold, including preparation, set-up at the customer's location, serving, bartending, and clean-up, whether or not separately stated. In general, these are services customarily provided by a restaurant as part of the sale of a meal and are therefore included in the taxable sales price of the meal.

The provision of a chef by the catering company to do all or part of the preparation of a meal at the customer's location does not alter the application of the rules in this Directive. Further, a caterer may generally not avoid collecting and remitting tax on the entire sales price of the meal by asserting that ownership of the food passed to its customer prior to preparation. The rule in 830 CMR 64H.6.5(f)(2) is limited to situations where meals are either resold or provided to a client's customers or employees on a regular basis at a fixed location, such as in an employee cafeteria.

Rental Charges

As stated above, an excise is imposed upon retail sales in Massachusetts by any vendor of tangible personal property, unless otherwise exempt. G.L. c. 64H, § 2. "Sale"

includes leases and rentals. The definition of "sale," as it is used in chapter 64H specifically includes "any transfer of title or possession, or both, exchange, barter, *lease, or rental*, conditional or *otherwise*, of tangible personal property ... for a consideration." G.L. c. 64H, § 1. Taxable charges include rental charges for tangible personal property such as linens, chairs, tables, dishware, and glasses.

If a caterer separately states a charge for rental of tangible personal property to its customer, the caterer must collect and remit sales tax on the rental charges. If a caterer rents items from another vendor for a customer's event, the caterer may give its vendor a resale certificate, providing that the caterer separately states the rental charges to its customer.

Catering businesses must pay retail sales or use tax on rentals or purchases of items from other vendors for their own use in the catering business. In this instance, the catering business is considered the consumer of tangible personal property.

Gratuities and Tips Excluded from the Sales Price Subject to Tax

Service charges, gratuities or tips that are distributed by a vendor such as a catering business to service employees, wait staff employees or service bartenders as provided in G.L. c. 149, § 152A are excluded from the sales price subject to tax^[4]. G.L. c. 64H, § 1, as amended by St. 2005, c. 163, § 32, effective April 1, 2006.

G.L. c. 149, § 152A provides “(a)ny service charge or tip remitted by a patron or person to an employer shall be paid to the wait staff employee, service employee, or service bartender by the end of the same business day, and in no case later than the time set forth for timely payment of wages under (G.L. c. 149) section 148.” Civil and criminal penalties may be imposed for noncompliance. G.L. c. 149, § 27C.

Delivery Charges

Nontaxable charges from a catering company to its customer include delivery charges meeting the requirements of DD 04-5, which provides that a transportation charge will be treated as nontaxable provided that the following requirements are met:

- (1) The charge reflects a cost of preparing and moving the goods to a location designated by a retail customer;
- (2) The charge is separately stated on the invoice to the customer (not merely on the internal books and records of the vendor); and
- (3) The charge is set in good faith and reasonably reflects the actual costs incurred by the vendor.

Vendor Registration

Every vendor engaged in business in Massachusetts is required to register with the Department online at www.mass.gov/dor. G.L. c. 64H, § 7, G.L. c. 62C, § 67. A catering business making sales at retail of tangible personal property in Massachusetts must register as a vendor, collect and pay over taxes on its sales, and file returns reflecting those sales. Catering businesses may accept a properly completed Sales Tax Resale Certificate, Form ST-4, from other vendors engaged in the business of selling meals.

Reporting Requirements

Generally, catering companies must report sales of meals, including charges listed in Directives 1a and 1b, on the sales tax on meals return, Form ST-MAB-4. Sales and rentals of tangible personal property must be reported on the sales and use tax return, Form ST-9.

Sales to Tax Exempt Groups or Organizations

Sales to a catering business acting through or on behalf of a government organization or a nonprofit organization which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code may be exempt, provided that certain requirements have been met. See 830 CMR 64h.6.5(5)(f); (9)(a)4; (12)(b) or (d), as applicable.

Catering businesses purchasing through or on behalf of government organizations or nonprofit organizations must certify that they are doing so by presenting a properly executed Form ST-5, Sales Tax Exempt Purchaser Certificate, when making such purchases. Form ST-5 must contain the name, address, and, if available, the exemption number of the organization on whose behalf purchases are being made. At the time of purchase, the caterer must attach to the Form ST-5 submitted to the vendor, a copy of the organization’s Form ST-2, Certificate of Exemption.

/s/Alan LeBovidge

Alan LeBovidge
Commissioner of Revenue

April 4, 2006

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[1] For purposes of this Directive, separately stated charges must be shown on the bill or invoice presented to the customer as well as on the vendor’s books and records.

[2] Separately stated bartending charges are not subject to tax where the bartender is serving alcoholic beverages provided by the customer and purchased by the customer from a vendor other than the caterer.

[3] Generally, DD 04-6, Sales Tax Treatment of Restaurant Meals that are Resold by Restaurant Meal Delivery Companies, does not apply to catering businesses.

[\[4\]](#) G.L. c. 149, § 152A defines these terms as follows:

"Wait staff employee", a person, including a waiter, waitress, bus person, and counter staff, who: (1) serves beverages or prepared food directly to patrons, or who clears patrons' tables; (2) works in a restaurant, banquet facility, or other place where prepared food or beverages are served; and (3) who has no managerial responsibility.

"Service employee", a person who works in an occupation in which employees customarily receive tips or gratuities, and who provides service directly to customers or consumers, but who works in an occupation other than in food or beverage service, and who has no managerial responsibility.

"Service bartender", a person who prepares alcoholic or nonalcoholic beverages for patrons to be served by another employee, such as a wait staff employee.

"Service charge", a fee charged by an employer to a patron in lieu of a tip to any wait staff employee, service employee, or service bartender, including any fee designated as a service charge, tip, gratuity, or a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip.

"Tip", a sum of money, including any amount designated by a credit card patron, a gift or a gratuity, given as an acknowledgment of any service performed by a wait staff employee, service employee, or service bartender.