Letter Ruling 09-8: "Liquor Store as Caterer"

November 30, 2009

You have requested a letter ruling on behalf of ********** [Taxpayer] as to whether certain transactions involving alcoholic beverages give rise to an obligation to collect and remit sales/meals tax pursuant to G.L. c. 64H, § 2. The facts as stated below are drawn from your letter requesting this ruling.

Facts

The Taxpayer operates a liquor store in Massachusetts from which it sells alcoholic beverages pursuant to a liquor license granted pursuant to G.L. c. 138, §15. The Taxpayer's customers purchase alcoholic beverages by first visiting the Taxpayer's business and selecting the desired products. As a convenience to the customer, the Taxpayer may deliver the beverages to a business or residence where an event is scheduled and provide related bartending services. The Taxpayer's employees (or independent contractors) will serve as bartenders in such cases. For purposes of these events, the Taxpayer will delay credit card processing (or request for similar payment) until after an event so that unopened alcohol containers may be returned and "netted" against the purchase price.[1] The Taxpayer charges a separate service fee for bartending and associated set up, if requested by a customer.

Requested Rulings

You ask us to rule (1) that the Taxpayer does not operate a restaurant; (2) that sales of alcoholic beverages sold by the Taxpayer are not considered sales of "meals" and are therefore not subject to sales/meals tax; or (3) if the alcoholic beverages are considered "meals," their sale is exempt from tax because they are not owned by the Taxpayer at the point of being served.

Discussion of Law

Massachusetts imposes a tax on sales at retail of tangible personal property and telecommunications services at the rate of 6.25% of the gross receipts of the vendor from all such sales unless an exemption applies. G.L. c. 64H, § 2. As of the date of this Ruling, certain cities and towns have imposed an additional .75% local option tax on sales of meals pursuant to G.L. c. 64L.[2] Under G.L. c. 64H, § 6(h), sales of food products for human consumption are exempt from tax, but food products does not include sales of "meals consisting of any of the items defined as food products . . . for consumption on or off the premises where sold." *Id.* "Meals," in turn are defined as "any food or beverage, or both, prepared for human consumption and provided by a

restaurant, where the food or beverages is intended for consumption on or off the restaurant premises . . . ." *Id.*

The statutory definition of a restaurant encompasses "any eating establishment where food, food products, or beverages are provided and for which a charge is made, including but not limited to, a cafe, lunch counter, private or social club, cocktail lounge, hotel dining room, catering business, tavern, diner, snack bar, dining room, vending machine, and *any other place or establishment* where food or beverages are provided, whether stationary or mobile, temporary or permanent." G.L. c. 64H, § 6(h) (italics supplied). This list includes catering business[es] and the Department's Sales Tax on Meals Regulation clearly states that a caterer, *i.e.*, 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 customer, is considered a restaurant. 830 CMR 64H.6.5(5)(f)1. *Also see* DD 06-3 regarding taxable charges by caterers.

The Taxpayer acknowledges that it serves beverages for which a charge is made on the premises of its customers, and provides related bartending services, set up, *etc.* Indeed, the Taxpayer's website directs customers to a separate page for ********** that states:

Our services include:

- Entertainment Director to help plan your event
- Professionaly [sic] trained, state-certified bartenders
- Full Bar of our 'Top Shelf' Wines and Spirits or Beer & Wine Bar
- Delivery, set-up and cleanup
- Ice, coolers, bar fruits, drinkware, napkins, stir-sticks and garnishes
- $1,000,000.00 Liquor Liability insurance
- Open Bar or Cash Bar

The same web page notes that the services are available at "your home, business or rented facility such as ********** or your favorite rental facility." Based on these facts, the Department rules that the Taxpayer meets the definition of a caterer and is to be regarded as a restaurant serving taxable meals.

In opposition, the Taxpayer maintains that it cannot be a restaurant because it does not maintain an "eating establishment" as that term is commonly used and is not primarily engaged in the business of selling meals for which a charge made, as required by the Meals Tax Regulation. 830 CMR 64H.6.5(5)(b)(1). Instead, it contends that it is primarily engaged in selling liquor at retail and provides a service by bartending and does not make sales of alcohol at the time of serving. In support, the Taxpayer points out that it is a liquor store and that under its license, "any sale of [alcoholic] beverages shall be conclusively presumed to have been made in the store wherein the order was received from the customer." G.L. c. 138, § 15.

We do not find these arguments persuasive and begin with the proposition that the Taxpayer is not a restaurant because it is primarily engaged in making retail sales of alcoholic beverages. It is well established that a part of a business may be a restaurant, quite apart from the rest of the business. *See e.g.*, 830 CMR 64H.6.5(6)(a) dealing with sales from the "restaurant part" of a grocery store, supermarket, fish market, video store, *etc*. appears to be treated as a separate part of Taxpayer's business and may be viewed as the "restaurant part" of the Taxpayer's overall operations.

As for being an eating establishment, the definition of a restaurant quoted above is extremely broad and includes "any place" where food or beverages are provided, whether stationary or mobile, temporary or permanent. The premises need not be owned or maintained by the taxpayer. Indeed, many, perhaps most caterers, do not own or maintain the premises where the taxable meals are prepared and or served. The fact that a home or rented facility such as ********** is not commonly thought of as an "eating establishment" is of no consequence. For example, a vending machine is not commonly considered an eating establishment, but it, like a caterer is a restaurant by law. Finally, the licensing requirement under G.L. c. 138 with respect to sales from the Taxpayer's premises has no affect on whether the Taxpayer is a restaurant or caterer within the meaning of G.L. c. 64H, § 6, and the long standing regulations adopted by the Department.

The Taxpayer also argues that is not a caterer or restaurant because sales of alcohol alone are not commonly considered meals, as required by DOR regulation. *See* 830 CMR 64H.6.5(5)(d) (food or beverage must be served in a "manner commonly considered a meal.") However, this premise is belied by the underlying statute itself, which defines a meal in the disjunctive as "any food *or* beverage, *or* both." G.L. c. 64H, § 6 (h) (emphasis supplied). In addition, the statute further defines cocktail lounges and taverns as restaurants.

The Taxpayer argues that the charges made by the Taxpayer are "in substance" only a service fee and a fee for products used (*e.g.*, miscellaneous bartending supplies), and that the Taxpayer only "typically assists third party 'caterers' in the events in question … [S}uch caterers are the true providers of a catering service as was likely intended by the regulation." But we fail to see how this argument, even if true, helps the Taxpayer's position here. A subcontractor is no less a contractor because it acts at the behest of, or to assist another contractor. If the Taxpayer is acting as a caterer serving meals, it must collect tax on those meals regardless of whether other caterers are also involved in the chain of command.

The Taxpayer next argues that even if it is a "restaurant" and serves "meals" for a charge, the meals are not owned by the Taxpayer when sold and should be exempt from sales/meals tax pursuant to 830 CMR section 64H.6.5(5)(f)(2). Under the Department's regulation, the question of whether the customer or caterer owns the meal at the time of sale is applicable only to situations in which "the caterer *acts as the client's agent and purchases food on the client's behalf*." 830 CMR 64H.6.5(5)(f)(2)(italics supplied). *See also Harrison Conferences Services of New England v. Commissioner of Revenue*, 394 Mass. 21 (1985)(status of the parties as principal and agent may establish that no sale has taken place). This is clearly not the case here: there is no agency relationship under Massachusetts law between the Taxpayer and each customer for whom it tends bar.

Rulings

The Taxpayer is a caterer. The Taxpayer is therefore considered a restaurant selling meals for which a charge is made, and is subject to tax under G.L. c. 64H, §§ 2, 6(h) and G.L. c. 64L, as applicable. The taxable sales price includes fees for bartending and set-up, whether or not separately stated.

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:lr

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[1] In the alternative, for payment purposes, the Taxpayer may receive payment before an event for alcohol purchased at the liquor store, and later credit the account of the customer separately for returned and unopened containers.

[2] *See* TIR 09-13, Part II, Section C for local option meals tax sourcing rules for caterers.