

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

TSB-A-85(31)S
Sales Tax
August 21, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S841025A

On October 25, 1984 a Petition for Advisory Opinion was received from Almash's Kitchen, Inc., 1611 Smithtown Ave., Bohemia, New York 11716.

The issue raised is whether Petitioner was required to collect state and local sales tax on its sales of prepared food and whether it may credit tax collected by its customers against its tax liability.

Petitioner states that it made sales of prepared food to customers and accepted resale certificates in good faith in lieu of collecting sales tax. Petitioner avers that the customers to whom it made its sales were registered vendors who collected tax from their customers and remitted such tax to New York State. Petitioner reasons that if it can establish that the proper tax has been paid by its customers to the State, Petitioner should be allowed such tax paid as credit against the tax which Petitioner should have collected from its customers.

The Tax Law provides, in pertinent part, for the imposition of sales tax on: "The receipts from . . . every sale of food . . . [made] in or by restaurants, taverns or other establishments in this state, or by caterers. . ." Tax Law 1105(d)(i). There is no exemption from tax in the Tax Law for the resale of food or drink taxed under section 1105(d) of the Tax Law. In recognition of this, the Sales and Use Tax Regulations state that "[a]ny person purchasing food or drink for resale as such is required to pay tax thereon at the time of purchase." 20 NYCRR 527.8(i)(1).

Therefore, Petitioner's acceptance of resale certificates in lieu of collecting the sales tax was improper. Petitioner is liable for the sales tax which it failed to collect.

The Sales and Use Tax Regulations provide further that "[w]hen . . . food or drink is resold, the seller is required to collect tax from the purchaser." Consequently, Petitioner's customers were required to collect tax on their sales of the prepared food. 20 NYCRR 527.8(i)(2).

Finally, the Sales and Use Tax Regulations state that "[t]he 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." 20 NYCRR 527.8(i)(3). This paragraph of the Regulations applies to Petitioner's customers and not to Petitioner. In order for Petitioner to recover the tax for which Petitioner is liable, Petitioner must collect from its customers the tax it should have collected at the time of

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making the sales. Once Petitioner's customers have paid to Petitioner the tax they should have paid at the time of making their purchases, such customers may apply to the State Tax Commission for a credit. The credit is limited to the amount of tax paid by Petitioner's customer to Petitioner on food resold by Petitioner's customer.

DATED: July 15, 1985

s/ANDREW F. MARCHESE
Chief of Advisory Opinions

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