

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

TSB-A-92 (68) S
Sales Tax
September 29, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920424A

On April 24, 1992 a Petition for Advisory Opinion was received from Barrow Food Corporation, 1099 Rte-25A, Stony Brook, New York 11790.

The issue raised by Petitioner, Barrow Food Corporation, is whether it is obligated to collect sales tax on food delivered to the campus when acting as a subcontractor to another company which has a contract to sell food, food products and beverages at food service facilities located on the campus of the State University of New York at Stony Brook.

Petitioner, Barrow Food Corporation, is a recently formed New York Corporation whose purpose was to acquire a retail pizzeria doing business at 1099 Rte-25A, Stony Brook, N.Y. 11790. The previous owners had entered into a contract with Araserve, Inc. (hereinafter ARA), to provide a pizza delivery food service to the campus. ARA has an agreement with the Faculty Student Association of the State University of New York at Stony Brook (hereinafter FSA) to sell food, food products and beverages, etc. to students from its facilities located on campus. ARA does not keep its on-campus facilities open 24 hours a day, and consequently has entered into contacts with off-campus food suppliers to provide delivery of food to students on campus when its facilities are closed. For the purposes of this opinion it is presumed that the agreement between ARA and FSA meets the terms and conditions and qualifies for the exemption provided by Section 1105(d)(ii)(B) of the Tax Law.

In a typical transaction a student will call Petitioner with a food request. Petitioner will prepare the food and deliver it on campus to the student. The student may utilize their FSA Declining Balance Accounts to purchase such food by presenting Petitioner a signed voucher (no cash or checks are involved) for the food. Petitioner will submit the voucher to ARA for redemption. ARA will pay Petitioner the face value of the voucher minus ARA's commission. The agreement also provides that Petitioner be responsible for any sales tax owed on the receipts from such transactions. Before any sale is made to a student, Petitioner must verify (via a computer terminal to ARA) that the student has not exceeded his credit limit.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax. -- . . . there is hereby imposed and there shall be paid a tax . . . 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

(ii) The tax imposed by this subdivision shall not apply to:

(B). . . food or drink, other than beer, wine or other alcoholic beverages, sold at a restaurant, tavern or other establishment located on the premises of a college, university or a school (other than a nursery school, kindergarten, elementary or secondary school) to a student enrolled therein who purchases such food or drink under a contractual arrangement whereby the student does not pay cash at the time he is served, provided the school, college or university described in this paragraph is operated by an exempt organization described in subdivision (a) of section eleven hundred sixteen, or is created, incorporated, registered, or licensed by the state legislature or pursuant to the education law or the regulations of the commissioner of education, or is incorporated by the regents of the university of the State of New York or with their consent or the consent of the commissioner of education as provided in section two hundred sixteen of the education law;. . .

Section 527.8 of the Sales and Use Tax Regulations states, in part:

527.8 Sale of food and drink [Tax Law, §1105(d)] (a) Imposition. Sales tax is imposed on the receipts, including any cover, minimum, entertainment or other charge, from every sale of beer, wine or other alcoholic beverages and food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers:

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the sale is for consumption off the premises and the vendor (or someone acting on behalf of the vendor) after delivery either serves or assists in serving, cooks, heats or provides services with respect to the food or drink; and

(3) in those instances where the sale is for consumption off the premises of the vendor all sandwiches and other food and drink unless the food or drink is sold in:

(i) an unheated state; and

(ii) the same form and condition, quantities and packaging commonly used by food stores not principally engaged in selling foods prepared and ready to be eaten.

...

(h) Exclusions. The tax imposed on the sale of food or drink shall not apply to:

(3) Food or drink, other than alcoholic beverages, sold to an enrolled post secondary school student, under the terms of a contractual agreement whereby the student does not pay cash when served. In addition, such sales must be made at a restaurant, tavern or other establishment on the premises of the school which is a postsecondary school. Such postsecondary school must be operated by an exempt organization or operated with the sanction of the State of New York.

In the instant case, the State University of New York at Stony Brook is considered to be a qualifying postsecondary school for the purposes of Section 1105(d)(ii)(B) of the Tax Law and Section 527.8(h)(3) of the Sales and Use Tax Regulations. However, when delivering food to students located on the campus of SUNY at Stony Brook, Petitioner, who is not located on campus, is not considered to be making a sale of food at a restaurant, tavern or other establishment on the premises of SUNY at Stony Brook. Therefore, Petitioner's food sales do not qualify for the exclusion from sales tax provided under Section 1105(d)(ii)(B) of the Tax Law and Section 527.8(h) of the Sales and Use Tax Regulations.

Rather, Petitioner's receipts from the sales of food to the students on the campus of SUNY at Stony Brook are subject to the tax imposed under the provisions of Section 1105(d)(i) of the Tax Law and Section 527.8(a) of the Sales and Use Tax Regulations. Accordingly, Petitioner is liable for collecting and remitting sales tax on the receipts from sales of food delivered to students on the campus of SUNY at Stony Brook.

DATE: September 29, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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