STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **SKY CHEFS DIVISION OF FLAGSHIP INTERNATIONAL** for Revision of a Determination or for Refund of Sales and Use Taxes under Article 28 and 29 of the Tax Law for the Period March 1, 1980 through May 31, 1983.	DECISION DTA NO. 801640

The Division of Taxation filed an exception of the determination of the Administrative Law Judge issued on November 6, 1987 with respect to the petition of Sky Chefs Division of Flagship International, P.O. Box 61777, Dallas, Texas 75261, for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through May 31, 1983 (File No. 801640). Petitioner appeared by Andrew P. Wagner, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Each of the parties filed a brief on exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether a separate charge for certain services performed by petitioner in connection with the sale of food and drink to airlines is subject to sales and use tax.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination except that we modify finding of fact "7" as stated below. The remaining facts are incorporated herein by this reference and are summarized as follows.

Petitioner, Sky Chefs Division of Flagship International, was primarily engaged in the business of catering food and services to airlines at various airports located in New York State and other states. All such catering services involve airlines which operate scheduled commercial passenger flights in intrastate, interstate or foreign commerce.

On September 20, 1984, as the result of an audit, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1980 through May 31, 1983 fortaxes due of $3,243,852.25, plus interest of $1,042,838.48, for a total of $4,286,690.73.

On audit, the Division of Taxation disallowed three categories of nontaxable sales claimed by the petitioner. Only one of the disallowed categories remains in issue on this exception, service charges made by the petitioner to the airlines in connection with the supply of catered meals. Tax in the amount of $3,099,878.01 was determined by the Division on these service charges.

Finding of fact "7" of the Administrative Law Judge's determination is modified to read as follows:

In conjunction with its supply of catered meals, petitioner provides certain other services which the Division characterized as pick up, cleaning and return of airline owned meal service equipment and utensils. These services are recharacterized and described as:

1. cleaning meal service equipment - the petitioner cleaned the airline owned meal service equipment and utensils,

2. delivery service - the petitioner delivered the meals and serving equipment to the airlines directly to the aircraft,

3. strip service - at the termination of a flight petitioner removed all food service equipment from the aircraft, and generally cleaned and removed trash from the galley area of the plane, and

4. overhead charges - included indirect costs associated with the sale of the meals such as rent, heat, utilities and general administrative expenses.

These services were billed to the airlines either by direct computer entries by petitioner or by an invoice reflecting an aggregate service charge. The aggregate charge was shown separately from the charge for food on petitioner's daily billing recap and recorded as such in a separate income account in the general ledger. The separate charge was for accounting purposes only. Petitioner did not clean meal service equipment without the sale of food and drink.

Internal accounting records indicated that these five components of the service charge reflected the following percentages of the service charge:

cleaning and equipment	16%
delivery charges	5%
strip charges	10%
liquor acquisition charges	5%
overhead	64%

OPINION

The Administrative Law Judge concluded that the service charge for the five services was a part of the receipt for the sale of the food and drink as an "other charge" within the meaning of section 1105(d)(i) of the Tax Law. As a part of the receipt for food and drink, the Administrative Law Judge held that the service charges were excluded from the section 1105(d) tax by section 1105(d)(ii) as "food or drink sold to an airline for consumption while in flight." (Tax Law {1105[d][ii].)

On exception, the Division of Taxation challenges both of these conclusions. As a result, the Division is in the unusual position of arguing that the service charge is <u>not</u> within the scope of the tax imposed by section 1105(d)(i) in order to preclude the application of the section 1105(d)(ii) exclusion. Instead, the Division argues that the service charge is taxable under section 1105(c)(3) as a receipt for the "service of maintaining, servicing or repairing tangible personal property." (Tax Law {1105[c][3].) Finally, the Division argues that the service charge is not within the exclusion of section 1105(c)(3)(v) for certain services rendered to commercial aircraft.

We affirm the determination of the Administrative Law Judge for the reasons stated below.

Section 1105(d) of the Tax Law imposes sales tax on:

"(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;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other 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, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten."

Excluded from this imposition of tax are the receipts from "food or drink which is sold to an airline for consumption in flight" (Tax Law {1105[d][ii][A]).

The Division argues that the five services billed for in the service charge are not sufficiently connected to the provision of the meals to include the charge for the five services within the receipt for the meals. Actually, the Division only challenges the sufficiency of the connection of two of the services - the cleaning of the meal service equipment and the stripping services. The remaining services, the Division concedes in its brief, would be included within the receipt for the food and drink had they not been grouped with the cleaning and stripping services and billed in the aggregate with these services.

With respect to the cleaning of equipment and the stripping, the Division argues that these are not within the section 1105(d)(i) imposition because they are accomplished after delivery and are not performed with respect to the food and drink that was the subject of the delivery. We reject this analysis.

The tax imposed by section 1105(d) is not imposed on the sale of food as tangible personal property; instead, this tax is on a hybrid transaction composed of the sale of food and service in combination (Matter of Burger King v. State Tax Commn., 51 NY2d 614, 621). The proportion of service versus food within this combination may vary depending on the type of vendor, but the combination must still be viewed in its totality (Matter of Burger King v. State Tax Commn., supra). The cleaning of equipment and utensils so that they may be reused and the removal of trash were an integral part of the total cycle of petitioner's providing of meals. We see no rationale for excising this part of the cycle from the hybrid transaction of providing catered meals.

The Division's theory is inconsistent with the provisions of section 1105(d)(i)(2) which define the imposition on catered meals to include instances where the vendor after delivery provides "other services with respect to the food or drink." The cleaning of meal service equipment, utensils and dishes and the removal of trash by the petitioner directly involved the food or drink, or at least their remnants. These were services with respect to the food or drink.

Furthermore, this theory flies in the face of the Division's own regulations which state the principle that "All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable." (20 NYCRR 527.8[f] emphasis added.) This principle is illustrated by an example that indicates that music and coat checking services provided for and billed by a caterer are taxable (20 NYCRR 527.8[f] example 1). The connection of utensil cleaning and trash removal to the serving of meals is more direct and obvious than is music or coat checking.

Finally, the Division's theory to excise the after delivery services from the meal service is inconsistent with the case law where the Division has successfully argued that all reimbursed costs

(including cleaning labor and supplies) as well as a management fee are taxable receipts for the sale of food and drink (In the Matter of Chemical Bank, State Tax Commn., January 29, 1982, determination confirmed Matter of Chemical Bank v. Tully, 94 AD2d 1; Matter of Corporate Food Services, Inc., State Tax Commn., October 6, 1982). The Division has followed and prevailed in this theory where, as here, the food service provider did not own the equipment or utensils cleaned (Matter of Prophet Foods Company, State Tax Commn., September 19, 1980).

The Division's attempt to distinguish these cases on the basis that they involved food sold for consumption on the premises where sold, taxable under section 1105(d)(i)(1), is not persuasive. First, none of these decisions recite the on premises consumption language of section 1105(d)(i)(1) as part of their rationale. Instead, all state only the general introductory language of section 1105(d)(i) and conclude simply that fees for reimbursed costs are sales of food and drink.

Secondly, logic does not support this distinction. Cleaning type services are either a part of the hybrid transaction of providing meals or they are not. The connection between the two does not decrease depending on who owns the premises where the meals are served.

Accordingly, we conclude that the fees paid for the equipment cleaning and stripping were receipts from the sale of food and drink within the meaning of section 1105(d)(i). It follows then that the entire service charge was part of the receipt, since the Division conceded with respect to the other three services. From this conclusion it necessarily follows that the service charge is excluded from tax by section 1105(d)(ii) as "food or drink which is sold to an airline for consumption while in flight."

Given the foregoing disposition of the issue, the Division's argument that the two services are subject to tax under section 1105(c)(3) of the Tax Law is moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Sky Chefs Division of Flagship International is granted to the extent indicated in conclusion of law "E" of such determination; the Division of Taxation is directed to modify the

Notice of Determination issued on September 20, 1984 accordingly, but, except as so granted, the petition is in all other respects denied.

Dated: Albany, New York
September 9, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner