STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICKY EISEN	:	DECISION DTA NO. 816316
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 December 1, 1992 through August 31, 1995.	:	

Petitioner Ricky Eisen, 343 East 30th Street, 21C, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issued on November 9, 2000. Petitioner appeared by Jared J. Scharf, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument was not requested.

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

ISSUE

Whether petitioner, as officer of Between the Bread II, Ltd., is liable for unpaid sales and use tax on the corporation's rentals of tables, chairs and equipment.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "5," "8," "9," "11," "12," "13" and "15" which have been modified. The Administrative Law Judge's finding of fact and the modified findings of fact are set forth below.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> The tax at issue arises from purchases by or rentals made to Between the Bread II, Ltd. ("BTB" or "the corporation"). BTB is wholly owned by petitioner Ricky Eisen.[1]

The Division of Taxation ("Division") assessed sales tax in the amount of $20,367.99 against BTB for the period September 1, 1992 through August 31, 1995. The Division assessed sales tax in the amount of $18,002.61 against Ms. Eisen for the period December 1, 1992 through August 31, 1995.

Petitioner concedes that the amount at issue set forth above was computed correctly if the rental transactions involved in this case are properly subject to sales tax.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The sole issue to be decided in this matter is whether petitioner, as officer, is liable for sales tax on the rental of tables, chairs and equipment to BTB or whether such rentals constituted sales for resale within the meaning of Tax Law § 1101(b)(4)(i)(A)

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[1]We have modified finding of fact "2" of the Administrative Law Judge's determination to remove reference to the corporation as a "petitioner." Finding of fact "15" of the Administrative Law Judge's determination notes that Between the Bread II, Ltd. (sometimes, ***infra***, the "corporation") filed a petition on January 23, 1998, nearly two years late. Finding of fact "15" and conclusion of law "A" of the Administrative Law Judge's determination concluded that the corporation's petition was untimely and, therefore, the Division of Tax Appeals was without jurisdiction to consider it. No exception was filed with respect to this finding and conclusion. Thus, the corporation's petition is not before us.

> and are, therefore, excluded from the tax imposed by Tax Law § 1105(a).[2]

BTB is a domestic corporation with retail facilities in New York county.

BTB is a "corporate caterer"[3] delivering food to corporate customers in New York. It has been in business since 1979. Its facility consists of a kitchen, storage area, small walk-in refrigerator, and a small muffin shop, where there is a walk-in trade. There are two tables for walk-in customers. Four walk-in customers can be accommodated at a time.

BTB does not own or rent a catering hall or party facility. BTB does not own or rent a warehouse or other facility for the storage of tables, chairs and other equipment and does not own tables, chairs and equipment for use by its customers.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> BTB's business consists of delivering food and beverages to corporate customers throughout Manhattan. The food is prepared in its kitchen. In that facility, BTB keeps food and beverages and prepares the food into sandwiches and platters for delivery to offices and businesses in Manhattan. In addition to providing food and beverages, BTB provides waiters, waitresses and bartenders when requested by its customers. Petitioner testified that to the

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[2]We modified finding of fact "5" of the Administrative Law Judge's determination to clarify the issue as it relates to this petitioner.

[3]Petitioners throughout these proceedings attempt to define "corporate" and "social" caterers as follows: a corporate caterer delivers food to corporate locations - it provides only the food and drink used in an event that is staged by the customer, whereas a social caterer stages the event by also providing the location (which would include tables, chairs, etc.). While one difference in these two types of caterers appears to be that those without locations serve primarily business clients and those with locations hold primarily social events, there is no evidence that a caterer with banquet facilities could not put on a corporate event or vice versa. Therefore, a caterer without a location or facilities to hold an event will be referred to as simply a caterer, and those with facilities will be referred to as caterers with facilities to more accurately reflect the record.

> extent BTB makes money, it is from the sale of food and beverages (Tr., pp. 54, 61, 64).[4]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> If a customer requests tables, chairs or other equipment for its office function, BTB orders the tables, chairs or other equipment from an independent third-party vendor, usually a company referred to in the record as "Posh."[5] Posh delivers the tables, chairs or other equipment directly to the customer's facility. Petitioner testified, "We don't want to handle it. We don't want to see it" (Tr., p. 54). At the conclusion of BTB's customer's office party or other function, Posh picks up its tables, chairs or other equipment from the customer's location. Posh bills petitioner for the rentals, plus any delivery charges. Petitioner, in turn, charges BTB's customers the same amount and attaches a copy of Posh's invoice to the BTB's customer invoice (Tr., p. 45).[6]

In the transactions between BTB and the independent third-party vendor of tables, chairs and other equipment, BTB did not pay sales or use taxes. BTB gave the independent third-party vendor a resale certificate which states that the tables, chairs or other equipment are for resale within the meaning of Tax Law § 1101(b)(4)(i)(A).

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> BTB collects sales tax from its customers based on the total charges for the items on its bill, including sales of food, beverages and, where appropriate, rentals of chairs, tables and other equipment. BTB then pays said tax over to the Division. BTB

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[4]We modified finding of fact "8" by adding the last two lines to more accurately reflect the record.

[5]Also appearing in the record as "Posh Partying," "RDSS" or "Broadway Famous." Hereinafter, "Posh" and "third-party vendor" are used interchangeably.

[6]We modified finding of fact "9" of the Administrative Law Judge's determination to more completely reflect the record.

> always keeps charges for food and beverages separate from other items on its bills to customers. All of its other charges are lumped under the "equipment" category on a customer's bill. "Equipment" includes everything that BTB rents to its customer (i.e., equipment it owns such as coffee urns and tablecloths), plus equipment it rents from Posh or other third-party vendors such as tables and chairs. Posh bills BTB for the rentals, plus any delivery charges. BTB in turn charges its customers the same amount. Waiters, waitresses and delivery charges are all included in the "equipment" category on the statement to the customer.[7]

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> Table, chair or other equipment rental charges constitute less than one per cent of BTB's gross sales (Tr., p. 56). Petitioner testified that BTB is not in the rental business (Tr., pp. 54, 61 and 64). The rentals from Posh or similar companies are an accommodation to BTB's customers. Petitioner testified that BTB *does not use* the tables, etc. (Tr., p 61). Petitioner also testified that BTB's employees *never take possession* of the items provided by Posh. In most cases, she said, BTB's employees do not even see the items provided by Posh (Tr., pp. 32, 33).[8]
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> .

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> BTB only derives a profit from food and beverage sales. BTB does not derive a profit from items provided by third-party vendors.[9]

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[7]We have modified finding of fact "11" of the Administrative Law Judge's determination to more accurately reflect the record.

[8]We have modified finding of fact "12" of the Administrative Law Judge's determination to more completely reflect the record.

[9]We have modified finding of fact "13" of the Administrative Law Judge's determination to make it more concise and eliminate repetition of facts earlier stated.

Petitioner, BTB and the Division agreed that both BTB and petitioner are liable for sales tax on any expenses claimed as capital improvements but disallowed in the audit up to the amount of $138.01.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> Ms. Eisen and BTB each filed a petition with the Division of Tax Appeals on January 23, 1998. Petitioner stipulated at hearing that the separate petition of BTB contesting the original notice of determination issued to BTB on February 20, 1996, was untimely filed. Ms. Eisen's petition contesting a conciliation order issued on October 31, 1997 is timely filed.[10]

The Division stipulated that if an adjustment is made to the liability of Ms. Eisen as an officer of BTB, based on an adjustment of the amount of tax owed by the corporation in the periods at issue, the liability of BTB will be similarly adjusted.[11]

BTB currently pays sales tax to third-party vendors for the rental of tables, chairs and other equipment. In turn, BTB charges its customer the total amount of the invoice that it receives from the third-party vendors, including the sales tax that it paid.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner stipulated that BTB did not file a timely petition. Accordingly, the Administrative Law Judge found that the Division of Tax Appeals has no jurisdiction with regard to said petition, and the petition was dismissed.

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[10]We modified finding of fact "15" of the Administrative Law Judge's determination to make it more concise.

[11]The parties have entered this stipulated agreement despite their mutual recognition that the Division of Tax Appeals has no jurisdiction over the petition of BTB.

The Tax Law imposes sales tax on "every retail sale" of tangible personal property in New York State (Tax Law § 1105[a]). A rental of tangible personal property is considered to be a retail sale (Tax Law § 1101[b][5]). However, a "sale for resale" is not a retail sale (Tax Law § 1101[b][4][i][A]). Petitioner argued below that BTB rents tables, chairs and other equipment solely for the purpose of re-renting it to its customers and that, since a rental is by definition a sale, a re-rental should by definition be considered a sale for resale.

The Administrative Law Judge rejected petitioner's argument relying on our decision in ***Matter of D-M Rest. Corp.*** (Tax Appeals Tribunal, April 18, 1991). In ***D-M***, the petitioner operated a restaurant but also had rooms reserved for private parties.[12] With a private room, D-M generally used it own cups, saucers and linens. If requested by a customer, D-M would provide special linens, utensils or cups and saucers ("special items"), which D-M rented from its suppliers. D-M, like petitioner here, would provide its suppliers with a resale certificate for these transactions. At the conclusion of the private party, the third party supplier would return and retrieve the special items. The Division argued that D-M should have paid sales tax on the special items. The Administrative Law Judge in ***D-M*** disagreed. The Administrative Law Judge in ***D-M***, relying on the Court's decision in ***Matter of Levine v. State Tax Commn.*** (144 AD2d 209, 534 NYS2d 522), concluded that the provision of the special items to its customers was a sale for resale under the statute and not taxable as part of D-M's catering service (Tax Law § 1105[d][I]; § 1101[b][4][i][A]). We reversed the Administrative Law Judge and, specifically, held that the provision of the special items by D-M was not a sale for resale. We distinguished ***Levine*** by pointing out that the customers in ***D-M***, unlike those in ***Levine***, had no right of

[12]In the lexicon of petitioner, D-M was a "caterer with facilities."

ownership or control over the disposition of the special items provided as part of the event, i.e., the customers in ***D-M*** could not take the linens and tableware home with them at the conclusion of an event.

The Administrative Law Judge in this case could find no basis to distinguish the special items in ***D-M*** from the rental of the tables, chairs and other equipment by BTB. Further, the Administrative Law Judge could find no legal substance to petitioner's distinction between a caterer and a caterer with facilities. D-M was a caterer with facilities, while BTB is a caterer with no facilities, but both are caterers for purposes of the Tax Law. The Administrative Law Judge concluded that the rationale set forth in ***Matter of D-M Rest. Corp.*** (***supra***) as applied to this case requires that the initial rental of these items by BTB is subject to tax as a retail sale, since there is no subsequent resale under the facts herein. Thus, the Administrative Law Judge denied the petition and sustained the Notice of Determination issued to petitioner.

ARGUMENTS ON EXCEPTION

Petitioner argues, as she did below, that all retail sales of tangible personal property are subject to sales tax and a rental is included in the definition of a retail sale (***see***, Tax Law § 1101[b][5]; § 1105). Furthermore, sales for resale are excluded from tax (***see***, Tax Law § 1101[b][4][i][A]). Therefore, petitioner urges, when BTB rents tables to provide to its customers for an event, it is renting to "re-rent" and the transaction should not be subject to sales tax. In support of her argument, petitioner points to ***Matter of Levine v. State Tax Commn.*** (***supra***) where the Appellate Division found that when a caterer provided flowers as part of an event, the caterer did not have to pay sales tax on the purchase of those flowers from third-party

vendors, where the customer was given the right to take or dispose of the flowers at the end of the event.

The Division argues that pursuant to Tax Law § 1105(d)(i) all charges made to BTB's customers were taxable as part of a catering service and were not purchases for resale. The Division points to 20 NYCRR 527.8(f)(2)(iii)(b) as clearly stating that tables and chairs used by a caterer in providing a service are not sales for resale and are subject to tax. Finally, the Division asserts that petitioner's reliance on ***Matter of Levine v. State Tax Commn.*** (***supra***) is misplaced since the court held that the flowers were for resale because physical control of the flowers was actually transferred to the customers.

In reply, petitioner asserts that she meets the requirements for proving a sale for resale as set forth in ***Matter of Levine v. State Tax Commn.*** (***supra***) and 20 NYCRR 527.8(f)(2)(v). Furthermore, petitioner asserts that she does not in any way use the tables and chairs that BTB rents; they are simply re-rented to the customer.

OPINION

We affirm the determination of the Administrative Law Judge.

All charges by caterers selling food or drink who serve or assist in serving or cooking are taxable (Tax Law § 1105[d]; 20 NYCRR 527.8[f]). In addition, property or services used by a caterer in performing a catering service are not purchased for resale and are subject to tax, including tables, chairs, linens, napkins, silverware and glassware (20 NYCRR 527.8[f][2]). Therefore, petitioner's rentals of tables and chairs are taxable as well as the catering charges to its customers.

Unlike the situation in ***Matter of Levine v. State Tax Commn.*** (***supra***), the tables and chairs rented by petitioner were packaged by petitioner as part of the catering service provided to its customers and, as such, remained within its control at all times. This conclusion is consistent with our holding in ***D-M*** where we distinguished ***Levine*** and held that the rental of linens and tableware was taxable as an integral part of the catering service provided as evidenced by the fact that the control over the items remained with D-M, not their customers.

After a thorough review of this case, we find that the Administrative Law Judge has completely and correctly addressed each of the issues and arguments raised by the parties. There are no arguments raised on this exception that would justify our modifying the conclusions of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ricky Eisen is denied;

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

3. The petition of Ricky Eisen is denied; and

4. The Notice of Determination (L-011716649-3) dated March 1, 1996 is sustained.

DATED: Troy, New York
July 5, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner