STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
21 CLUB, INC.	:	DECISION DTA NO. 820914
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 June 1, 1999 through November 30, 2002.	:	

Petitioner, 21 Club, Inc., filed an exception to the determination of the Administrative Law Judge issued on September 20, 2007. Petitioner appeared by DeGraff, Foy & Kunz, LLP (James H. Tully, Jr., Esq.) and S. Buxbaum & Company, CPAs, LLP (Michael Buxbaum, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was held on April 9, 2008 in Troy, New York.

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

ISSUE

Whether the Division of Taxation properly assessed sales and use taxes upon the rentals of certain audiovisual equipment by petitioner from third-party vendors, which was subsequently provided to its customers.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On May 2, 2002, the Division of Taxation ("Division") sent a letter to 21 Club, Inc. ("petitioner"), which advised that its sales and use tax records were scheduled for a field audit. Attached to the letter was a list of all records to be made available for audit. The audit period listed on the letter was June 1, 1999 through February 28, 2002. Subsequent letters from the Division to petitioner dated January 15, 2003 and February 10, 2003 amended the audit period to the period at issue in this proceeding, i.e., June 1, 1999 through November 30, 2002.

During the audit, a series of consents were executed by petitioner whereby it was agreed that sales and use taxes for the period June 1, 1999 through February 28, 2002 could be assessed at any time on or before March 20, 2005.

On March 14, 2003 and later on September 7, 2004, petitioner's controller signed a form AU-377.12, Test Period Audit Method Election, whereby petitioner consented to the use of a test period audit with respect to the audit of petitioner's sales and recurring purchases. The test period utilized was the calendar year 2001.

On audit, it was determined that petitioner had additional taxable sales in the amount of $23,860.24 with tax due thereon of $1,968.47.

A review of fixed assets and leasehold improvements resulted in tax being assessed in the amount of $29,397.57. Tax on purchases of computer equipment and supplies from out-of-state vendors totaled $9,927.57 and was agreed and paid by petitioner. Tax of $19,470.00 was assessed on mural painting services performed on walls and was not agreed to by petitioner.

Tax was assessed on recurring expense purchases in the amount of $87,877.70. Tax of $15,824.04 on general office supplies purchased from out-of-state suppliers was agreed and paid, which left a balance of $72,053.66. This amount resulted from petitioner's rental of audiovisual equipment for use by its customers.

Total tax was therefore assessed in the amount of $119,243.74, and the agreed portion was $27,720.08, which consisted of tax due on sales ($1,968.47), tax on office supplies from out-of-state suppliers ($15,824.04) and tax on certain fixed assets and leasehold improvements ($9,927.57), thereby leaving a balance of $91,523.66 in dispute.

Accordingly, on January 21, 2005, the Division issued a Notice of Determination to petitioner in the amount of $91,523.66, plus penalty and interest, for a total amount due of $172,520.04 for the period June 1, 1999 through November 30, 2002.

By a Conciliation Order (CMS No. 209019) dated December 2, 2005, the Division's Bureau of Conciliation and Mediation Services recomputed the tax due from $119,243.74 to $72,053.66, plus interest computed at the applicable rate. Penalties previously assessed were canceled. The $72,053.66 represents tax assessed on petitioner's rentals of audiovisual equipment for use by its customers during catered lunches, dinners and other events.

As previously noted, the Division utilized a test period audit with respect to sales and recurring purchases. The auditor examined invoices from King Cole Audio Visual Services ($103,710.01) and Presentation Services ($145,826.16) for audiovisual equipment for the year 2001. Tax due on these rentals for the year was $20,586.75, or $5,146.69 per quarter. The auditor utilized a straight-line method, i.e., the tax amount for the test period was divided evenly among the sales tax quarters at issue. Accordingly, for the audit period (14 quarters), total tax due was computed to be $72,053.66.

Petitioner is a restaurant located at 21 West 52nd Street in New York City. When petitioner catered an event and the customer requested that audiovisual equipment be provided, petitioner separately stated the charge for the equipment on its invoice to the customer. Petitioner's invoice to its customer included charges for food, beverages, tax and gratuity, as well as, where

appropriate, the charge for audiovisual equipment and related services. While petitioner charged sales tax on the audiovisual equipment provided to the customer and remitted the tax to the Division, it did not pay sales tax to the vendors of the equipment.

During the period at issue, approximately 50 percent of petitioner's customers used audiovisual equipment for their events.

On June 13, 2001, petitioner entered into a service agreement for audiovisual services with Presentation Services ("PS") whereby PS became the exclusive provider of audiovisual equipment and related services for petitioner's guests, clients and customers for a period of five years to expire on March 31, 2006. The service agreement provided, among other things, as follows:

a. PS would be the exclusive provider of audiovisual equipment and related services at petitioner's place of business, and petitioner would not operate its own equipment rental or enter into an agreement with any other provider;

b. PS would provide related audiovisual services to petitioner and its guests, customers and clients including the setting up and tearing down of the equipment;

c. Under certain limited circumstances, a third-party supplier of audiovisual equipment and services would be permitted to supply the equipment and services in cases where a particular client required or chose to retain such third-party vendor;

d. PS would staff an office at petitioner's premises with an appropriate and adequate number of staff and technicians to provide the audiovisual services;

e. PS would invoice all amounts due for services through petitioner's master billing system. If requested by petitioner's clients, PS would enter into other reasonable payment and prepayment arrangements with such clients. Petitioner would be responsible for

collecting all amounts due to PS included on room or master accounts for the account of PS; and

f. Petitioner would receive commissions based upon the revenues generated by PS's services at petitioner's premises. These commissions were 50% on equipment rentals, 25% on service charges, 50% on subrental equipment charges and 2% on annual equipment rentals.

Bryan McGuire, petitioner's chief operating officer, indicated that customers had complete control over the selection of audiovisual equipment and the arrangement of such equipment at the customer's event. The customers also had the option not to use any audiovisual equipment. In cases where a customer had multiple events occurring at or about the same time, the customer had the right to remove the equipment from petitioner's premises and take it to the other location. In those instances, separate arrangements would have to be made by the customer directly with PS and if the equipment was lost or broken, the customer was responsible for the repair or replacement costs.

When a customer chose to use audiovisual equipment, it entered into an agreement with petitioner and not with PS. The customers paid all charges for the equipment and related services to petitioner and petitioner collected the sales tax due thereon. The customer signed no agreement with PS and, therefore, had no direct relationship with the provider of the audiovisual services.

When holding an event at petitioner's premises, a customer had the option of arranging and paying for audiovisual equipment from a vendor of its choice or might, if it wished, bring its own equipment.

Petitioner did not rent audiovisual equipment or provide related services without also providing catering services, i.e., it was not in the business of renting or providing audiovisual equipment alone. PS handled the equipment 100% of the time. PS staff set up the equipment, operated it if appropriate, stayed during the event, and broke down the equipment at the conclusion of the event. Petitioner's staff did not handle or operate the audiovisual equipment.

As indicated in the service agreement with PS, petitioner received a commission, paid annually at the close of each year, from PS. Petitioner did not mark up the audiovisual equipment and related services provided to its customers.

At the time at which petitioner entered into an agreement with a customer to provide catering services, it informed the customer that audiovisual equipment, flowers, music, etc., could be provided by petitioner.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's assertion that the issue in this matter is analogous to the exemption provided for the purchase of flowers by caterers, citing ***Matter of Levine v. State Tax Commn.*** (144 AD2d 209 [1988]). The Administrative Law Judge noted that flowers, unlike other items purchased by caterers in performing catering services, are perishable, and, in most cases, not reusable. Audiovisual equipment is not perishable and may be reused.

The Administrative Law Judge rejected petitioner's argument that audiovisual equipment, unlike china, linen, silverware, etc., is not used to provide a catering service. Petitioner contends that its customers have the option to purchase audiovisual services from petitioner and, therefore, it is not part of the catering services provided by petitioner. The Administrative Law Judge determined that all of the equipment in question was governed by the following rule in the

Division's regulations: "Taxable tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to tax" (20 NYCRR 527.8[f][2][i]).

The Administrative Law Judge noted that petitioner is not in the business of renting audiovisual equipment or providing related services without also providing catering services. The Administrative Law Judge determined that the Division's regulation, 20 NYCRR 527.8(f)(2), is not erroneous, irrational or inconsistent with Tax Law § 1105(d) and, as such, the Division properly assessed sales and use taxes upon petitioner's rentals of audiovisual equipment from PS for the use by petitioner's customers at catered events on petitioner's premises.

ARGUMENTS ON EXCEPTION

On exception, petitioner argued that the Administrative Law Judge erroneously determined that it should have to pay sales tax on audiovisual equipment and services provided in connection with catering services.

Petitioner argued that pursuant to Tax Law § 1101(b)(1), purchases and rentals of equipment made for resale or re-rental are exempt from tax. Therefore, when petitioner provides audiovisual equipment and services through PS, petitioner is re-renting the audiovisual equipment and, thus, the transaction with the provider should not be subject to sales tax.

Petitioner argued, as it did below, that the issue is analogous to the exemption provided for the purchase of flowers by caterers.

Finally, petitioner argued that in order for a purchase of tangible personal property to qualify as a purchase for resale, the property must be purchased exclusively for resale or as a physical component part of tangible personal property that is resold, or for use in performing services subject to tax under Tax Law § 1105(c) and Tax Law § 1101(b)(4)(i).

The Division argued that petitioner's charges to its customers for the audiovisual equipment were subject to sales tax under Tax Law § 1105(d). The Division also argued that petitioner was not selling or renting the equipment as tangible personal property for purposes of sales tax. Finally, the Division states that petitioner was the retail purchaser of the audiovisual equipment and it owes sales tax on its rental payments for the equipment.

OPINION

A "retail sale" is defined in general terms as "the sale of tangible personal property to any person for any purpose" (Tax Law § 1101[b][4][1]). The definition of "sale" includes "[a]ny transfer of title or possession or both, . . . rental, lease or license to use . . ."(Tax Law § 1101[b][5]). The Division's regulations state, "The terms *rental, lease and license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property" (20 NYCRR 526.7[c][1]). The regulations also include the following relevant provisions:

> *Transfer of possession* with respect to rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:
>
> (i) custody or possession of the tangible personal property, actual or constructive;
>
> (ii) the right to custody or possession of the tangible personal property;
>
> (iii) the right to use, or control or direct the use of, tangible personal property (20 NYCRR 526.7[e][4]).
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> * * *
>
> When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment.

> *Example 15*: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman and the company determines the working hours and locations . . . . The transaction is within the definition of sale, and the transfer of possession has occurred by reason of the company's right to direct and control the use of the equipment by the operator . . . (20 NYCRR 526.7[e][6]).

There are two exclusions from the definition of "retail sale." The first exclusion is the purchase of tangible personal property "for resale as such" or as a physical component part of tangible personal property (Tax Law § 1101[b][4][i][A]). Petitioner asserts that this exclusion applies in reliance on ***Matter of Levine v. State Tax Commn.***, ***supra***, in which the court reversed the State Tax Commission and held that purchases of floral arrangements by a caterer from a florist were exempt from tax as purchases for resale. The court rejected the Division's argument that the flowers were part of a service performed by the caterer since the caterer's only role was to make arrangements with the florist and to place the flowers on the tables. Moreover, the flowers became the property of the ultimate customer to do with as it pleased as soon as the flowers were delivered.

In the present case, petitioner was in the business of providing a restaurant and catering service. Petitioner organized the event, including purchasing goods and services that a customer could purchase directly, i.e. audiovisual equipment, flowers, music, etc. When the customer used the audiovisual equipment at petitioner's premises, unless the customer chose to use a different vendor, the customer entered into a contract with petitioner, not PS. If a customer wanted to take the audiovisual equipment off of petitioner's premises, the customer would have to enter into a separate business agreement with PS. Accordingly, the audiovisual equipment when rented by a caterer, was subject to tax when used by a caterer in performing catering services.

We conclude that petitioner's reliance on the ***Levine*** case is misplaced. The floral arrangements purchased by the caterer, from the florist, were delivered by the caterer to the customer in an unaltered state at which point they became the property of the customer. Our decisions in ***Matter of Eisen*** (Tax Appeals Tribunal, July 5, 2001) and ***Matter of D-M Restaurant Corp.*** (Tax Appeals Tribunal, April 18, 1991) similarly distinguish ***Levine***. Accordingly, petitioner has not proven that its customers had every right of ownership and control of the disposition of the audiovisual equipment.

The second exclusion to the definition of retail sale is the purchase of tangible personal property for use in performing specified taxable services where the property becomes a part of the property upon which the taxable service is performed or where the property is "later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax" (Tax Law § 1101[b][4][i][B]). The referenced taxable services are those in Tax Law § 1105(c): (1) information services, (2) printing, (3) installation of tangible personal property, (5) maintaining, servicing, or repairing real property, (7) interior decorating and designing services, and (8) protective and detective services. Petitioner is not engaged in any of the services described in section 1105(c) but instead is engaged in the sale of services subject to tax under section 1105(d). Accordingly, it does not come within the exclusion.

We affirm the determination of the Administrative Law Judge. Petitioner has produced no evidence below, nor arguments on exception, that would justify our modifying the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 21 Club, Inc. is denied;

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

3. The petition of 21 Club, Inc. is denied; and

4. The Notice of Determination dated January 21, 2005 as modified in finding of fact "6" of the Administrative Law Judge's determination, is sustained.

DATED:Troy, New York
September 4, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner