

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PROMOCEANS, LTD. :
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, 2002 through :
November 30, 2003. :

: DECISION
DTA NOS. 822102
AND 822103

In the Matter of the Petition :
of :
STEVEN SALSBERG :
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, 2003 through :
November 30, 2003. :

Petitioners, Promoceans, Ltd. and Steven Salsberg, filed an exception to the determination of the Administrative Law Judge dated April 16, 2009. Petitioners appeared by Edmund J. Mendrala, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on November 18, 2009 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

ISSUE

Whether sales by petitioners to events known as after-prom cruises, which were sold to the general public, were properly subject to sales tax as admission charges to a place of amusement under Tax Law § 1105(f)(1).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “9” and “10,” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of facts are set forth below.

Petitioner,¹ Promoceans, Ltd., is in the high school prom and special events business. With respect to proms, petitioner contracts with schools to provide a facility, a caterer, music, decorations, and staff for such events. Petitioner’s customers may choose from among several facilities for their event, including boats that cruise New York harbor during the prom.

In nearly all cases during the audit period, the schools purchasing proms provided an exempt organization certificate, and petitioner properly did not charge sales tax. In a few instances during the audit period, the school was not an exempt organization, and petitioner properly charged sales tax. Hence, petitioner’s sales tax treatment of its prom sales did not result in any additional liability on audit and is not at issue herein.

Petitioner’s business also includes events known as after-prom cruises. As the name implies, such events involve a late night cruise. Petitioner sold after-prom cruises to groups and, on a general admission basis, to the general public.

Groups, usually (if not always) schools, purchased after-prom cruises in customized packages that, in addition to a boat charter, could include meals, decorations, a DJ, comedy acts,

¹ Unless otherwise indicated, all references to petitioner in this determination shall refer to Promoceans, Ltd.

karaoke, and casino games. It was petitioner's practice to secure an exempt organization certificate from the group purchasing the customized after-prom package. If exemption documentation was not provided, petitioner would charge sales tax on such customized after-prom cruises.

Petitioner scheduled its general admission after-prom cruises on dates that it anticipated a large number of proms in the New York metropolitan area. Two cruises were scheduled on each date: 1:00 A.M. to 4:00 A.M. and 4:00 A.M. to 6:30 A.M. This later cruise was also referred to as an "after after-prom" or a sunrise cruise.

During the period at issue, petitioner engaged Ticketmaster to sell general admission after-prom cruise tickets on its behalf. Petitioner also sold some general admission tickets directly to customers. Petitioner did not charge sales tax on its general admission after-prom cruises.

A customer purchasing a general admission after-prom cruise received a ticket. The ticket listed no breakdown or allocation of the purchase price, which was \$45.00 per person for the 1:00 A.M. to 4:00 A.M. cruise and \$36.00 per person for the sunrise cruise.

The general admission after-prom cruises departed from Pier 40 in New York City with 200 to 500 passengers aboard. Under the direction and control of the captain, the boat cruised around New York harbor and the Statue of Liberty before returning to Pier 40. The boat had a crew of about 20, including security, for these cruises.

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

The general admission after-prom cruises during the audit period were held on the Queen of Hearts,² a paddle boat with three decks and a capacity of about 500. The

² It is observed that the invoices in the record appear to cast doubt on this finding that all general admission after-prom cruises were on the Queen of Hearts. Specifically, 6 of the 16 disallowed test period invoices reference "Star" under the heading "Bill To." This is an apparent reference to the Star of Palm Beach, another paddle boat

first and second decks of the Queen of Hearts are open carpeted areas with windows along both sides and bench seats. The second deck also has a DJ booth and a small bar. The top deck of the vessel, which has a capacity of 100, has a steel plate deck with bench seating around the circumference, which is used by customers for dancing.³

We modify finding of fact “10” of the Administrative Law Judge’s determination to read as follows:

The Queen of Hearts has a sound system throughout the ship. A sound technician played recorded music during the after-prom cruises. Passengers were permitted to dance and did dance during the cruises. Although petitioner’s advertising promoted dancing as an attraction of the after-prom cruises, such advertisement did not name the Queen of Hearts as the vessel that would host the after-prom cruises.⁴

During the audit, in November 2005, the auditor assigned to this matter, Jose Rances, and his supervisor, Ronald Chan, visited the Queen of Hearts. The auditor’s field audit record (Form DO-220.5) contains the following entry regarding this visit:

Kept appointment to see and look at the boat, “Queen of Hearts,” which vendor uses in its operations. Seen layout of ship and imagined operations of vendor’s. Seems like drinks (soft drinks) served at the counter of the ship is incidental to the ride around the NYC harbor. Supervisor to contact FAM [Field Audit Management] and relay the impressions of this survey.

used by petitioner in its operations. Two of the invoices reference “Q Star,” an apparent reference to both the Queen of Hearts and the Star of Palm Beach. Additionally, three invoices reference “Club/Sun Star,” an apparent reference to a nightclub event and Star of Palm Beach sunrise cruise package, which is noted on a page on petitioner’s web site, a copy of which is in evidence. Similarly, another invoice references “Club/Sun Q.” Only one invoice simply references “Q.” Additionally, four invoices reference “TM” after-proms, an apparent reference to Ticketmaster, without any reference to a boat. Finally, one invoice references miscellaneous after-proms and one refers to a cancelled after-prom.

Considering, however, that the auditor indicated in both his report and his testimony that all general admission after-proms were held on the Queen of Hearts as was claimed by petitioner, and considering that the invoices were not specifically discussed at the hearing, this determination will defer to the auditor’s finding and petitioner’s contention.

³ We have modified this fact to more accurately describe the top deck of the vessel.

⁴ We have modified this fact to more accurately reflect the record.

Mr. Chan, the auditor's supervisor, transmitted an e-mail to Richard Graf of the Division's Field Audit Management group on November 22, 2005, advising Mr. Graf, in relevant part:

We had conducted a survey of the boat. The boat looks very old and does not look as nice as the pictures shown on the internet. . . . What we saw on the boat do [sic] not in line with what they advertise on the web The boat doesn't seem like to be [sic] a club. It appears to be geared toward sightseeing purpose.

Soft drinks, such as soda, juice or water, were available at no additional cost on after-prom cruises.⁵ Additionally, some food (also at no additional charge), such as fruit, bagels, muffins and potato chips, was set out for the passengers. There was no wait staff to serve passengers on after-prom cruises. In the experience of petitioner's president, students on general admission after-prom cruises do not eat much food.

Petitioner placed an advertisement in a 2004 edition of Promtime, a publication distributed to students. In its full-page ad, petitioner promoted its after-prom cruises as featuring "non-stop dancing," "New York's largest floating nightclubs," "live comedy show," "continental breakfast," at \$45.00 per person "all-inclusive." The same ad promoted the sunrise cruise, advising potential customers that they could "watch the sunrise by the Statue of Liberty," "meet your friends in the morning on our dancing breakfast cruise" at a cost of \$36.00 per person "all-inclusive," with a "casino purchase available." Additionally, the ad promoted a casino cruise that, in addition to all the features of an after-prom cruise, included "real casino games" with "\$500 playing chips included" and that passengers could "win prizes on every cruise." The ad indicates that casino cruises are available from 1:00 A.M. to 4:00 A.M. at \$54.00 per person and from 4:00 A.M. to 6:00 A.M. at \$46.00 per person. This advertisement includes a photo of the

⁵ The auditor's report indicates that the general admission after-prom cruises had a cash bar and that receipts from the cash bar were reported as taxable sales. This does not appear to be the case. A review of the sales tax returns and the auditor's work papers indicates that taxable sales reported by petitioner during the test period resulted from two contract sales of customized events to nonexempt groups.

exterior and interior of the Queen of Hearts and a photo of another boat. The ad encouraged potential customers to call Promoceans for more details about organizing a group (“huge discounts available,” “organize a group and you go for free,” “pay for college by organizing your after-prom”). The ad also encouraged the purchase of tickets through Ticketmaster by listing Ticketmaster’s phone number, various Ticketmaster outlets and noting that tickets could be purchased online at the Ticketmaster website.

Petitioner also mailed flyers to schools to promote its after-prom cruises. The record contains three flyers obtained from petitioner during the audit. These flyers promote and describe the after-prom, sunrise and casino cruises similarly to the Promtime ad and each has the same “all inclusive” price as listed in the Promtime ad. All three flyers indicate that advance purchase of tickets is required and list petitioner’s phone number to call.

The record also contains a copy of pages from petitioner’s website from January 2005. These pages describe the after-prom cruise as “the largest party on the water” and advises that passengers can “dance all night to New York’s hottest club DJs,” “enjoy a live comedy performance,” “unlimited soda, juice and continental breakfast” and “sail past the Statue of Liberty.” The “all inclusive” price is \$45.00 per person. The page advises potential customers that, to purchase tickets, they may “call us” (and lists a phone number) or obtain them “from Ticketmaster” and also provides a link to the Ticketmaster website.

The pages from petitioner’s website describe the sunrise cruise as “a cruise around the NYC harbor” and advises that passengers can “enjoy a live DJ and dance on the largest dance floor on the water,” “unlimited soda, juice and continental breakfast” and “relax with friends as the sun comes up.”

The sunrise cruise page also encourages potential customers to purchase a nightclub party along with a sunrise cruise and has a link to a Copacabana nightclub/sunrise cruise package.

The Division of Taxation (Division) calculated the assessment in this matter using a test period audit method. Petitioner agreed to the Division's use of such a method by its execution of a Test Period Audit Method Election dated November 14, 2006. The test period selected was June 1, 2002 through November 30, 2002. According to the auditor's work papers, petitioner reported \$427,485.00 in nontaxable sales during the test period. The Division reviewed such claimed nontaxable sales in detail and ultimately disallowed \$109,051.00. All such disallowed nontaxable sales were for general admission after-prom cruises. The Division thus disallowed 25.51 percent of claimed nontaxable sales during the test period. The Division then applied this percentage to petitioner's claimed nontaxable sales throughout the audit period to determine additional tax due.

Pursuant to its audit calculations, on January 29, 2007, the Division issued to petitioner Promoceans, Ltd. a Notice of Determination that asserted additional tax due of \$33,570.69, plus interest, for the period March 1, 2002 through November 30, 2003.⁶

While contesting the Division's conclusion that its general admission after-prom cruises were taxable, petitioner does not take issue with the Division's audit calculations.

On February 1, 2007, the Division issued to petitioner Steven Salsberg a Notice of Determination that asserted additional tax due of \$17,913.65, plus interest, for the period March 31, 2003 through November 30, 2003. Mr. Salsberg was assessed as a corporate officer or a

⁶ During the course of the audit, petitioner executed a series of consents extending the period of limitations for assessment with respect to the period at issue through June 20, 2007.

person responsible for the collection and payment of sales and use taxes due from Promoceans, Ltd.

Petitioner Steven Salsberg was the president and owner of Promoceans, Ltd., at all times relevant herein. He conceded that he was a responsible officer of Promoceans for sales tax purposes.

During the course of the audit, the auditor, Mr. Rances, and his supervisor, Mr. Chan, consulted with the Division's Field Audit Management group by e-mail regarding the taxable status of petitioner's after-prom cruises. Eileen Safran was copied on some of the e-mail correspondence between Mr. Rances and Mr. Chan and Field Audit Management. Ms. Safran and Mr. Chan were both section heads in the Division's Queens district office. Ms. Safran was not otherwise involved in the audit at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Division asserted that petitioner was liable for sales tax under three separate sections of the Tax Law. Thus, the Administrative Law Judge addressed all three sections under which the Division imposed tax upon petitioner's sales.

First, the Division argued that the after-prom cruises were taxable pursuant to Tax Law § 1105(d). Under its theory, the Division claimed that the admission fees to petitioner's after-prom cruises were charges to patrons as a cover charge for entertainment to an establishment serving food or beverages. However, the Administrative Law Judge concluded that the food and drink available on the boat was merely incidental to the charge for the cruise and, as such, was not properly taxable under this section. The Division did not file an exception with respect to this conclusion.

In the alternative, the Division stated that the charges for the general admission after-prom cruises were taxable as admission charges to a “roof garden, cabaret or other similar place” under Tax Law § 1105(f)(3). The Administrative Law Judge reviewed the Division’s regulations to define a “roof garden, cabaret or other similar place” and held that, based upon his initial finding that the food and drinks available to the passengers on the general admission after-prom cruises were incidental, it necessarily followed that the music and dancing afforded the passengers was not in conjunction with the sale or service of food and drinks within the definition of the regulations. As such, the Administrative Law Judge determined that the receipts from the sales of general admission after-prom cruises were not taxable under Tax Law § 1105(f)(3). The Division did not take an exception with respect to this conclusion made by the Administrative Law Judge.

The last basis upon which petitioner’s sales were considered taxable by the Division was pursuant to Tax Law § 1105(f)(1) as an admission charge to a place of amusement.

In analyzing the facts, the Administrative Law Judge stated that recorded music was played on the general admission after-prom cruises, that there was an area for dancing and that passengers were permitted to and did dance. In addition, the Administrative Law Judge relied on petitioner’s advertising for the fact that the after-prom cruises emphasized dancing as a significant part of the event. Given these factors, the Administrative Law Judge reasoned that such after-prom cruises were more in the nature of a dance party and not merely a sightseeing tour. Accordingly, the Administrative Law Judge determined that the receipts from the sales of the general admission after-prom cruises were properly taxable pursuant to Tax Law § 1105(f)(1).

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge incorrectly relied on outdated advertising materials for his conclusion. Petitioner contends that the determination fails to separate the advertising, promotion and sales of group after-prom cruises from the sale of individual single ticket sales of after-prom cruises. Petitioner emphasizes the difference in the offerings for group sales versus the sightseeing tours sold to individual customers. Petitioner states that its sales to groups included a wide array of services and entertainment, which were not sold to the individuals purchasing a ticket for a sightseeing cruise. Petitioner states that a careful review of the testimony and documentation in the record establishes that the offerings were quite different between the group sales and the sales made to individuals who bought tickets for a sightseeing tour.

In opposition, the Division agrees with the determination of the Administrative Law Judge. The Division claims that since music and an area for dancing were available for the group packages as promoted in the advertising material, such services are available to the individual ticket holders when they purchase their general admission tickets to board the boat. Thus, the Division argues that it properly imposed sales tax on petitioner's receipts for general admission ticket sales.

OPINION

As stated by the Administrative Law Judge in his determination, ticket sales to a sightseeing cruise are not subject to sales tax under the law (*see, Matter of Walter*, TSB-A-07[27]S). Therefore, this case turns on the facts and whether the after-prom cruises in question were nontaxable sightseeing cruises or whether the cruises were similar to the taxable group sale

after-prom cruises that included such services as meals, decorations, a DJ, comedy acts, karaoke and casino games.

We reverse the determination of the Administrative Law Judge.

Tax Law § 1105(f)(1) imposes a sales tax, in pertinent part, on: “[a]ny admission charge where such admission charge is . . . to or for the use of any place of amusement in the state . . .”

Tax Law § 1101(d)(2) defines “admission charge” as used in section 1105(f)(1) as “[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor.” A “place of amusement” is defined as “[a]ny place where any facilities for entertainment, amusement, or sports are provided” (Tax Law § 1101[d][10]).

The Administrative Law Judge concluded that the after-prom cruises at issue were properly characterized as dance parties and he noted that passengers were permitted to dance and did, in fact, dance. The Administrative Law Judge relied on our decision in *Matter of Antique World* (Tax Appeals Tribunal, February 22, 1996) that concluded that dancing was a form of amusement and entertainment. Moreover, the Administrative Law Judge reviewed the advertisements in evidence, in which petitioner described certain packages available on its after-prom cruises, all of which included dancing and other activities as described above.

After a careful review of the record, we do not agree that dancing was a part of the general admission after-prom cruises. The testimony of Mr. Salsberg, coupled with the entry made by the auditor in the Tax Field Audit Report and the e-mail from the auditor’s supervisor, contained in the workpapers, strongly support petitioner’s contention that the ticket sales for the general admission after-prom cruises represented merely a sightseeing tour around New York Harbor. It is undisputed that the general admission ticket was to board the Queen of Hearts. As outlined in the facts, the auditor noted that the vessel was old and, after inspecting it, concluded that the soft

drinks served were probably incidental to the trip around the harbor (and the Administrative Law Judge below concluded that the food and beverage offered to passengers were incidental). The auditor's supervisor noted that the boat in the advertisements did not reflect the actual condition of the Queen of Hearts. This characterization supports Mr. Salsberg's testimony wherein he credibly explained the advertising placed into the record was not reflective of the cruise received by a purchaser of a general admission ticket, but rather, such advertisements represented the types of cruises that were booked by the group consumer.

Moreover, petitioner presented testimony from four employees that supported its argument that the group sales of after-prom cruises was separate and distinct from the general admission ticket cruises. It is evident from the testimony that petitioner has significant after-prom cruise sales that it sells directly to groups as opposed to the individual who purchases the general admission ticket. As set forth in the facts, petitioner's sales to groups are not at issue in this matter. We find that the advertisements in the record were not reflective of the sales at issue in this case, but rather, were advertisements aimed toward group sales.

The Division's attorney had Mr. Salsberg explain the different types of cruises available (*see*, Tr., pp. 81 - 103). It is clear from the evidence that petitioner books many types of events and, depending on the event, a certain boat would have to be reserved. Mr. Salsberg explained that in order to customize an after-prom cruise, it would have to be a group sale.

Q [Mr. Maslyn]. All right. And an [after-prom] cruise can, in effect, be customized by a group that's engaging your services, can it not?

A [Mr. Salsberg]. Only a group, meaning they would have to hire the whole boat . . . (Tr., p. 83 [lines 16-20]).

The record demonstrates that petitioner did not own casino tables, linens, dinnerware, glassware or decorative lighting. This fact supports petitioner's argument that it is involved in

the business of organizing proms and other events. As an organizer, it is required to contract for food, beverages and entertainment pursuant to a group sales contract. There is no dispute that petitioner charges sales tax on all such sales. The after-prom cruise at issue is a completely different product than the customized cruises.

This case involves the after-prom cruise that is received when an individual purchases a general admission ticket. This ticket is for admission onto a vessel that is basically a sightseeing cruise. Mr. Salsberg explained that these cruises were designed as an alternative activity for teens after their prom, that did not involve drinking. For this type of event, petitioner provides nonalcoholic beverages and snacks with recorded music piped over a sound system. In fact, petitioner typically serves beverages that have been donated to it. From the record as a whole, we cannot view this cruise as anything other than a sightseeing cruise. As such, these ticket sales are not for an enumerated taxable service under the law. Thus, we find that the receipts from the general admission ticket sales are not subject to sales tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Promoceans, Ltd. and Steven Salsberg is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petitions of Promoceans, Ltd. and Steven Salsberg are granted; and

4. The Notices of Determination dated January 29, 2007 and February 1, 2007 are cancelled.

DATED:Troy, New York
May 13, 2010

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner