STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
D-M RESTAURANT CORP. AND ANTHONY MAY AND BERNARD DALY, AS OFFICERS	:	DETERMINATION
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, 1983 through December 31, 1985.	:	

Petitioners, D-M Restaurant Corp. and Anthony May and Bernard Daly, as officers, c/o Top of the Park, 1 Gulf & Western Plaza, New York, New York 10023, filed a petition 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, 1983 through December 31, 1985 (File No. 805371).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on September 12, 1989 with all briefs to be filed by January 19, 1990. Petitioners appeared by Gerard A. Navagh, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether it was proper for the Division of Taxation to consider a portion of D-M Restaurant's lease payments subject to tax on the ground that it included the rental of tangible personal property.

II. Whether the Division of Taxation properly determined that D-M Restaurant should have paid sales tax on its rental of linen and tableware which it subsequently rented to its customers.

FINDINGS OF FACT

During the period in issue, petitioner D-M Restaurant Corp. operated a restaurant which was open to the public. The establishment also had rooms available for private parties.

In June 1985, the Division of Taxation ("Division") began a field audit of the restaurant's books and records. The examination led the Division to conclude that the restaurant's records were sufficient to warrant an audit method which utilized all of the restaurant's records within the audit period.

In the course of the audit, the Division found that the restaurant was conducting its business pursuant to a lease dated December 1, 1974 between itself and Rockefeller Center, Inc. In addition to providing space for a restaurant, the lease stated that the landlord was to furnish the corporation with certain personal property (characterized as "Premises Equipment") consisting of "fixtures, kitchen and other equipment, tables, chairs, furniture, furnishings, decorations, draperies, floor coverings, utensils, linen, silverware, glassware, chinaware and other personal property and restaurant paraphernalia". The lease further provided that the restaurant was to be responsible for breakage, damage or other destruction of the equipment except for ordinary wear and tear. In the event of breakage or other damage, the tenant was required to either replace the item or pay the landlord the replacement value.

The Division considered the lease payments taxable to the extent they were for the rental of tangible personal property. However, the restaurant's lease did not segregate the amount spent for office space from the amount spent on the rental of tangible personal property. Therefore, in order to compute the amount of tax due, the Division estimated that 4% of the gross rental amount was attributable to the leasing of tangible personal property. This percentage was obtained from an agreement reached between the parties at a conference of the former Tax Appeals Bureau following a prior audit of the restaurant. The Division determined that tax in the amount of $7,960.55 was due on the rental of tangible personal property by multiplying 4% of the corporation's gross rent payments by the applicable tax rate.

When customers made arrangements for an affair at the restaurant, they were asked if they wished to have flowers. If flowers were desired, customers could either make their own arrangements with a florist to obtain flowers or, at the customers' request, the restaurant made arrangements to provide the type of flowers desired. At the conclusion of the affair, the

customer had the right to remove the flowers.

When the restaurant obtained flowers at the request of its customer, it was the restaurant's practice to give the florist a resale certificate. When the restaurant prepared its bills to the customer, the flowers would be separately itemized and contain a provision for sales tax. The restaurant maintained records of which flowers were ordered for which private party. On audit, the Division adopted the position that the restaurant should have paid tax on its purchase of the flowers and, therefore, tax in the amount of $8,255.13 was due.

Generally, the restaurant used its own cups, saucers and linens at private parties. However, if it was requested by a customer, the restaurant rented the specific type of linen, utensils, cups and saucers which a customer desired for a particular affair. On these occasions, the restaurant issued resale certificates to its supplier. When the restaurant prepared its bill to the customer, there would be a charge on the invoice for the additional items that were supplied with a provision for sales tax. At the conclusion of an affair, a supplier would return to the premises to recover the items. The restaurant maintained records indicating which items were provided to which customer. In the course of the audit, the Division concluded that petitioners should have paid tax to their supplier on their rental of linens, cups, flatware, crystal and similar items, resulting in a finding that tax was due in the amount of $665.73.

The balance of the assessment, $234.64, arose from alleged consumption of beverages by employees. At the hearing, the Division conceded this portion of the assessment.

In its field audit report, the Division referred to each of the foregoing findings as use tax due.

On August 18, 1986, on the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to D-M Restaurant Corporation d/b/a Rainbow Room which assessed sales and use taxes for the period March 1, 1983 through December 31, 1985 in the amount of $17,116.05 plus interest of $3,162.00 for a total amount due of $20,278.05. On the same day, the Division issued separate notices to petitioners Bernard Daly and Anthony May, as officers of the restaurant, which assessed the

same amount of tax and interest which had been assessed against the restaurant.

Periodically, petitioners replaced the china, glass, linens and silverware which had initially been furnished by the landlord. Upon replacement, title remained with the landlord. When it was required to replace an item, the corporation paid sales tax. On larger items, the corporation occasionally shared the cost of the item with the landlord or the landlord paid for the item.

The restaurant paid New York City commercial occupancy tax on its rental payments to the landlord.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax on the retail sale of tangible personal property. The term sale includes a rental, lease or license to use (Tax Law § 1101[b][5]). In this instance, the restaurant's lease includes the rental of tangible personal property. Therefore, the Division properly concluded that the lease payments for the rental of tangible personal property were subject to tax (Tax Law § 1101[b][5]; 1105[a]).

Petitioners have challenged the foregoing analysis on several grounds. First, it is petitioners' contention that since the auditor characterized the amount due on this portion of the audit as use tax, it is incumbent upon the Division to show that the amount sought for the rental of tangible personal property is subject to use tax.

Initially, it is recognized that the amount being sought by the Division is not use tax (see generally, Matter of Bloomingdale Bros. v. Chu, 70 NY2d 218, 519 NYS2d 347, 349). Rather, the tax being sought by the Division is the sales tax which should have been remitted by the restaurant to its landlord (Tax Law § 1101[b][5]; 1105[a]).

Nevertheless, although petitioners have correctly characterized the tax sought, they have not presented an argument warranting relief in their favor. From the outset, the Division has sought the tax due on the rental of tangible personal property. The characterization of the tax by the auditor was a mere misnomer. There has been no argument or evidence that this misnomer misled or prejudiced petitioners. Secondly, petitioners' argument overlooks the fact that the tax

was assessed by a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (emphasis added). There has been no attempt by the Division to assess only use tax.

Petitioners have cited former Article 73 of the New York City Sales Tax Regulations and the history of the Sales Tax Law to establish that the Division should have obtained the value of the tangible personal property from the restaurant's landlord.[1] This argument must also be rejected.

Petitioners' landlord, as a vendor, may be liable for the sales tax due on the rental of the tangible personal property (Tax Law § 1131[1]). If the Division had sought the tax in issue from petitioners' landlord, this section might have provided some insight on the parties' burden of proof. However, since the tax was not collected and remitted by petitioners' landlord, the restaurant remains liable for the tax in issue (Tax Law § 1133[b]). Moreover, the burden of proof is on the restaurant to show that the amount of tax sought is incorrect (State Administrative Procedure Act § 306[1]). In this regard, it is noted that, contrary to petitioners' argument, it was rational to determine the amount of tangible personal property subject to tax on the basis of an agreement reached at a prior Tax Appeals Bureau conference. Furthermore, although petitioners have objected to the calculation of tax due used by the

Division, they have not presented any evidence upon which an alternative amount may be determined.

Lastly, petitioners have objected to the imposition of tax because the restaurant has already paid New York City occupancy tax on its rental payment. It is petitioners' position that

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[1]This regulation provided, in part, as follows:

> "Where there is a license to use both tangible personal property and real property for a lump-sum rental, the burden shall be on the lessor to establish the rental value of the tangible personal property, and to charge and collect from the lessee the tax upon said value. Should the lessor fail to establish satisfactorily the rental value attributable to the license to use the tangible personal property, the Comptroller may fix such value as he deems proper in the circumstances."

imposition of tax would be "double taxation" and that they are entitled to a credit for an overpayment of tax made to the City of New York. This request must also be rejected. There is no provision in the New York Tax Law for an overpayment of New York City commercial rent tax to be applied as a credit against New York State sales tax. Second, without commenting on the merits of petitioners' claim of an overpayment, it appears that petitioners' remedy is to apply for a refund of New York City occupancy tax to the Commissioner of Finance of the City of New York (Administrative Code § 11-709[a]).

B. In its post hearing memorandum, the Division conceded that the restaurant's purchases of flowers were exempt from tax as purchases for resale on the basis of Matter of Levine v. State Tax Commn. (144 AD2d 209, 534 NYS2d 522). The Division further argued that Levine should not be extended to the restaurant's rental of linen and tableware. This argument will be considered first since it will prove dispositive of this issue.

C. In Levine, the petitioner provided a catering service. Prior to a scheduled event, a representative of petitioner met with the customer to discuss arrangements including flowers. If flowers were desired, the customer had the choice of purchasing them directly from the florist. In this event, the customer paid sales tax directly to the florist. Alternatively, the customer could purchase the flowers directly from the caterer. In the latter situation, the caterer gave a resale certificate to the florist so sales tax would not be charged on the sale. However, when the caterer prepared its bill to the customer, a portion of the sales tax charged was on the charge for flowers. Following a challenge to a finding of the State Tax Commission that the caterer should have paid tax on its purchase of flowers, the court held that the caterer's purchase of flowers was for resale and therefore not subject to sales tax.

It is the Division's contention that Levine is distinguishable from the restaurant's activity involving linens and tablecloths because the flowers become the property of the restaurant's customers and the customers may take the flowers home with them. On the other hand, the restaurant is obligated to return the linens and tableware.

The distinction raised by the Division must be rejected. The term sale includes a rental

(Tax Law § 1101[b][5]). Therefore, it makes no difference that in Levine there was a purchase for resale whereas in this matter there was a rental by the restaurant for a second rental to the customer. In each instance there was a sale for resale within the meaning of Tax Law § 1101(b)(4).

The Division also argues that Levine is distinguishable because, unlike flowers, linens and tableware are an integral part of the restaurant's catering service which is taxed under Tax Law § 1105(d). Under the facts presented herein, this argument must also be rejected. The provision of special linens, tableware and similar items was separate and distinct from petitioners' regular business operation. As such, it was not a part of the restaurant's regular service of providing food and drink. Thus, the provision of the special linen and tableware by the restaurant was obtained for resale and is not subject to sales tax. In this regard, it is briefly noted that the Division's reliance upon Matter of Java Caterers, Inc. (State Tax Commission, February 6, 1985) is similarly misplaced. Unlike the situation presented in this matter, the linens and other items at issue therein were part of that caterer's regular business operation.

In view of the foregoing, the restaurant's remaining arguments as to why these items should be excluded from tax is rendered academic.

D. At the hearing and in its brief, the Division conceded that the restaurant is not liable for the tax due on the alleged employee consumption of beverages. Accordingly, the tax due on this item is cancelled.

E. The petition of D-M Restaurant Corp. and Anthony May and Bernard Daly is granted to the extent of Conclusions of Law "B", "C" and "D" and the Division is directed to modify the notices of determination and demands for payment of sales and use taxes due accordingly; the petition is, in all other respects, denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE