

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

BETWEEN THE BREAD II, 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 September 1, 1992 through August 31, 1995. :

DETERMINATION
DTA NOS. 816315
AND 816316

In the Matter of the Petition :

of :

RICKY EISEN :

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, Between the Bread II, Ltd., 141 East 56th Street, New York, New York 10022, 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 September 1, 1992 through August 31, 1995. Petitioner, Ricky Eisen, 343 East 30th Street, 21C, New York, New York 10016, 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 December 1, 1992 through August 31, 1995.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 27, 2000 at 10:30 A.M., with the reply brief received on May 25, 2000, which date began

the six-month period for the issuance of this determination. Petitioners appeared by Jared J. Scharf, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioner Between the Bread II, Ltd.'s rentals of tables, chairs and equipment from third parties are properly subject to sales or use taxes.

FINDINGS OF FACT

1. A stipulation of facts pursuant to 20 NYCRR 3000.11 was submitted with regard to each of the two petitions filed in this matter. Most of the facts as set forth in the stipulation have been substantially adopted in this determination, with only slight changes in wording and organization as Findings of Fact "2" through "14" and "16". The paragraphs of the stipulations which have been substantially amended in this determination are addressed in Finding of Fact "15" and Conclusion of Law "A".

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

3. 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.

4. Petitioners concede that the amount at issue set forth in Finding of Fact "3" was computed correctly if the rental transactions involved in this case are properly subject to sales tax.

5. The only issue to be decided by this determination is whether BTB's rentals of tables, chairs and equipment from third parties are properly subject to sales or use taxes. More specifically, the only issue is whether the rental of tables, chairs and equipment to BTB were sales for resale within the meaning of Tax Law § 1101(b)(4)(i)(A); (5) that are excluded from tax pursuant to Tax Law § 1105(a).

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

7. BTB is a "corporate caterer"¹ 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.

8. The bulk of 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 midtown Manhattan. In addition to providing food and beverages BTB provides waiters, waitresses and bartenders.

¹Petitioners 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.

9. 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. The independent third-party vendor delivers the tables, chairs or other equipment to the customer's facility. At the conclusion of BTB's customer's office party or other function, the independent third-party vendor picks up its tables, chairs or other equipment from the customer's location.

10. 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).

11. In the transactions between BTB and its customers, BTB collects from its customers and pays over to the Division sales tax for all items on its bill, including sales of food and beverages and, where appropriate, rentals of chairs, tables or other equipment. When the category "equipment" is listed on a customer's bill it includes everything that BTB rents to the customer (i.e., equipment it owns such as coffee urns and equipment it rents from third-party vendors such as tables and chairs). Waiters and waitresses are also included in the "equipment" category on the statement to the customer.

12. Table, chair or other equipment rental expenses are an incidental part of the business of BTB as they comprise only approximately one percent of the gross sales of BTB.

13. BTB derives a profit only from food and beverage sales. BTB did not derive a profit from items it rented from third-party vendors; it merely arranged for these items as an accommodation to its customer.

14. Petitioners and the Division agreed that both petitioners are liable for sales tax on any expenses claimed as capital improvements but disallowed in the audit up to the amount of \$138.01.

15. Ms. Eisen and BTB each filed a petition with the Division of Tax Appeals on January 23, 1998. Ms. Eisen's petition contested a conciliation order that had been issued on October 31, 1997. Therefore, Ms. Eisen timely filed a petition with the Division of Tax Appeals. There is no conciliation order issued in the name of BTB in the record in this matter. Therefore, the petition filed by BTB is deemed to have been filed to contest the original notice of determination issued to BTB on February 20, 1996. A petition contesting such notice was due on May 20, 1996 (Tax Law § 1138). Since the petition was not filed until January 23, 1998, there is no timely petition filed on behalf of BTB and the Division of Tax Appeals has no jurisdiction over this matter.²

16. 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.³

17. 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.

²The stipulations signed by the parties indicated that the Division of Tax Appeals had jurisdiction over the petition of Ms. Eisen and not over the petition of BTB. Parties cannot stipulate to subject matter jurisdiction (*see, Strina v. Troiano*, 119 AD2d 566, 500 NYS2d 736; *Matter of Plymouth Tower Assocs.*, Tax Appeals Tribunal, December 27, 1991). They can, however, stipulate to the underlying facts that would confer or withhold such jurisdiction. Therefore, this finding of fact incorporates the facts necessary to reach the result intended by the parties. (*See also*, Conclusion of Law "A".)

³The words "[t]he Division stipulated that" have been added to the language of the stipulation since the Division of Tax Appeals has no jurisdiction over the matter of the petition of BTB.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioners assert that pursuant to Tax Law § 1101(b)(5) and Tax Law § 1105, all retail sales of tangible personal property are subject to sales tax and a rental is included in the definition of a retail sale. Furthermore pursuant to Tax Law § 1101(b)(4)(i)(A) sales for resale are excluded from tax. Therefore, when BTB rents tables to provide to its customers for an event, it is basically renting to “re-rent” and the transaction should not be subject to sales tax. In support of their argument petitioners point to *Levine v. State Tax Commn.* (144 AD2d 209, 534 NYS2d 522) 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 (*see also*, 20 NYCRR 527.8[f][2][v]).

19. 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 petitioners’ reliance on *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, as compared to the current situation where the tables, chairs and other equipment are returned to the third-party vendor.

20. In reply petitioners assert that they meet the requirements for proving a sale for resale as set forth in *Levine v. State Tax Commn.* (*supra*) and 20 NYCRR 527.8(f)(2)(v). Furthermore, they assert that they do not in any way use the tables and chairs they rent. They are simply re-rented to the customer.

CONCLUSIONS OF LAW

A. As noted in Finding of Fact “15”, petitioner BTB did not file a timely petition and the Division of Tax Appeals has no jurisdiction with regard to this petitioner. Therefore, the petition of BTB must be dismissed.⁴

B. Tax Law § 1105(a) imposes a tax on “every retail sale” of tangible personal property in New York State. Pursuant to Tax Law § 1101(b)(4)(i)(A) a “sale for resale” is not a retail sale. Furthermore, a rental is considered to be a retail sale (Tax Law § 1101[b][5]). Petitioner’s argument stated simply is 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.

Petitioner’s argument must fail as it has been specifically rejected by the Tax Appeals Tribunal (*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. With a private room D-M also provided its customers with food, cups, saucers and linens (D-M was a caterer with facilities). When a customer made a request for special linen, utensils or cups and saucers not owned by D-M these would be obtained by D-M from its suppliers. D-M would provide its suppliers with a resale certificate for these transactions. At the conclusion of the private party the supplier would return and take the special items back. The Division took the position that D-M should have paid sales tax on the special items. The Administrative Law Judge in his determination adopted the same arguments asserted by petitioners in this matter that a rental for re-rental was a sale for resale and excluded from sales tax pursuant to Tax Law

⁴All future references in this determination to petitioner shall refer to petitioner Ricky Eisen unless otherwise noted.

§ 1101(b)(4)(i)(A) . The Administrative Law Judge concluded that since provision of the special items by D-M was not a part of its regular business operation the provision of the special items to the customers was an actual sale for resale under the statute and not taxable as part of D-M's catering service (Tax Law § 1105[d][I]). The Tax Appeals Tribunal reversed the Administrative Law Judge. The Tribunal specifically held that the provisions of the special items by D-M were not a sale for resale and distinguished *Levine v. State Tax Commn. (supra)* by pointing out that the customers in *D-M* had no right of ownership or control over the disposition of the special items provided as part of the event. I can find no basis to distinguish the special items in *D-M* from the rental of the tables, chairs and other equipment in this case. Petitioner's distinction between a caterer and a caterer with facilities does not assist in this regard. D-M was clearly a caterer with facilities as opposed to BTB, a caterer. However, in the *D-M* case there was a specific finding that the provision of the special items was not a part of D-M's regular business, it was incidental to its business as was the provision of tables, chairs and other equipment by BTB. While this finding might support a conclusion that the provision of these things is not subject to tax pursuant to Tax Law § 1105(d)(i) as part of BTB's catering business, *Matter of D-M Rest. Corp. (supra)* clearly holds that the initial rental of these items by BTB is subject to tax as a retail sale, since there is no subsequent resale.

C. The petition of Between the Bread II, Ltd. is dismissed. The petition of Ricky Eisen is denied and the Notice of Determination is sustained.

DATED: Troy, New York
November 9, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE