

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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. :
: DETERMINATION
: 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. :
:

Petitioner Promoceans, Ltd., 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, 2002 through November 30, 2003.

Petitioner Steven Salsberg 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, 2003 through November 30, 2003.

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on

August 27, 2008 at 10:30 A.M., with all briefs to be submitted by December 24, 2008, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Edmund J. Mendrala, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

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 “cover, minimum, entertainment or other charge[s]” under Tax Law § 1105(d), admission charges to a place of amusement under Tax Law § 1105(f)(1) or admission charges to a “roof garden, cabaret or other similar place” under Tax Law § 1105(f)(3).

FINDINGS OF FACT

1. 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 which cruise New York harbor during the prom.

2. 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.

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

3. 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.

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 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, which has a capacity of 100, has an area for dancing.

10. 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. Petitioner's advertising promoted dancing as an attraction of the after-prom cruises (*see* Findings of Fact 14-18).

11. 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

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 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.

incidental to the ride around the NYC harbor. Supervisor to contact FAM [Field Audit Management] and relay the impressions of this survey.

12. 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.

13. Soft drinks, such as soda, juice or water, were available at no additional cost on after-prom cruises.³ 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.

14. 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 which, in addition to all the features of an after-prom cruise, included "real casino games" with

³ 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.

“\$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 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.

15. 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.

16. 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 from Ticketmaster” and also provides a link to the Ticketmaster website.

17. 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.”

18. 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.

19. 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.

20. Pursuant to its audit calculations, on January 29, 2007, the Division issued to petitioner Promoceans, Ltd. a Notice of Determination which asserted additional tax due of \$33,570.69, plus interest, for the period March 1, 2002 through November 30, 2003.⁴

21. 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.

⁴ 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.

22. On February 1, 2007, the Division issued to petitioner Steven Salsberg a Notice of Determination which 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 person responsible for the collection and payment of sales and use taxes due from Promoceans, Ltd.

23. 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.

24. 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.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c) imposes sales tax on certain enumerated services. A sightseeing cruise by itself is not such an enumerated service and therefore receipts from the sale of a sightseeing cruise are not subject to sales tax. In the instant matter, however, the question of whether petitioner's receipts from its sales of general admission after-prom cruises are subject to sales tax is complicated by the availability of food, drinks and dancing on the cruises. The Division contends that these factors render the transactions at issue taxable and proposes three bases of liability. Petitioner asserts that the cruises were nontaxable sightseeing cruises and that the availability of food, drink, and dancing was incidental.

B. First, the Division asserts that the after-prom cruises were taxable pursuant to Tax Law § 1105(d), which imposes sales tax on the receipts from sales of food and drink sold in or by restaurants or caterers. As used in this provision, receipts includes “any cover, minimum, entertainment or other charge.” The Division thus asserts that the admission fees to petitioner’s after-prom cruises are charges to patrons of an establishment serving food or beverages (*see Matter of Yager*, Tax Appeals Tribunal, March 23, 1989).

C. In its interpretation of Tax Law § 1105(d) with respect to boat cruises, the Division has consistently taken the position in advisory opinions that where food and drink is incidental to a boat cruise the charge for the cruise is not taxable under Tax Law § 1105(d) (*see Walter*, Advisory Opinion, October 19, 2007 [TSB-A-07(27)S]; *Klondike Cruises*, Advisory Opinion, July 29, 1998, [TSB-A-98(46)S]. The same advisory opinions define incidental food and drink as “ancillary to the cruise itself, where significant time and/or expense is not devoted to the preparation or serving of food and drink, and no separate charge is made for the food and drink” and note the provision of a “simple box lunch” as an example of incidental food on a cruise.

D. Advisory opinions are not precedential and are in no way binding in this matter (*see* Tax Law § 171; 20 NYCRR 2376.4). In this instance, however, the cited advisory opinions reasonably interpret Tax Law § 1105(d).⁵ Accordingly, such reasoning is adopted in this determination.

⁵ The cited advisory opinions determine the taxable status of cruises under Tax Law § 1105(d) by examining the true nature or essence of the cruises. This rationale has frequently been employed to determine the taxable status of transactions under Tax Law § 1105 (*see e.g Matter of U-Need Roll Off Corp. v. New York State Tax Commn.*, 67 NY2d 690, 499 NYS2d 921 [1986]; *Matter of Helmsley Enterprises v. Tax Appeals Tribunal*, 187 AD2d 64, 592 NYS2d 851 [3^d Dept 1993]; *Matter of Atlas Linen Supply Co. v. Chu*, 149 AD2d 824, 540 NYS2d 347 [3^d Dept 1989]).

E. Consistent with the analysis contained in the advisory opinions cited above, the record in this matter establishes that the food and drink available to passengers on the general admission after-prom cruises was incidental and ancillary. Specifically, it is clear that the expense of the food and drink was not significant and that little time was devoted to its preparation. Furthermore, the food was not served and no separate charge was made for the food. Certainly, the food and drink available on the subject cruises was no more significant than the simple box lunches deemed incidental by the Division in its advisory opinions cited above. Accordingly, the subject cruises were not taxable pursuant to Tax Law § 1105(d).

F. The Division also contends 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 Division’s regulations define such an establishment as follows:

(i) Any roof garden cabaret or similar place which furnishes a public performance for profit.

(ii) Any room in a hotel, restaurant, hall, or other place where music and dancing privileges or any entertainment, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise. (20 NYCRR 527.12[b][2])

G. Here, as discussed above, the food and drinks available to the passengers on the general admission after-proms was incidental. Accordingly, it cannot be said that the music and dancing afforded the passengers was “in connection with the serving or selling of food and drink.” The boat, therefore, was not a “roof garden, cabaret or other similar place” as defined in 20 NYCRR 527.12(b)(2), and the receipts from general admission after-prom cruises are not taxable under Tax Law § 1105(f)(3).

H. The Division also asserts that the receipts from the general admission after-prom cruises were taxable as admission charges to a place of amusement pursuant to Tax Law § 1105(f)(1), which imposes sales tax 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 an “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]). As used in Tax Law § 1101(d)(10), the words “amusement” and “entertainment” are to be interpreted according to their commonly understood meanings (*Matter of Wein v. Murphy* 28 AD2d 222, 284 NYS2d 303, 307 [3^d Dept 1967]). Consistent with this principle, the Tax Appeals Tribunal has held that a dance is a form of amusement and entertainment and that a place offering such activity is a “place of amusement” under Tax Law § 1101(d)(10) (*Matter of Antique World*, Tax Appeals Tribunal, February 22, 1996).

I. In this case, recorded music was played on the general admission after-prom cruises, there was an area on the Queen of Hearts for dancing, and passengers were permitted to and did, in fact, dance (*see* Findings of Fact 9 and 10). Moreover, petitioner’s advertising for the after-prom cruises emphasized dancing as a significant part of the event (*see* Findings of Fact 14-17). The advertising is contemporaneous⁶ documentary evidence of the activities carried on at the after-prom cruises (*Matter of Antique World*, Tax Appeals Tribunal, February 22, 1996) and reveals that the essence of the after-prom cruises was that of a party with dancing as a major

⁶ While the dates on the advertising fall outside the audit period, there is no claim by petitioner or evidence in the record to suggest that the character or nature of the after-proms changed from the subject period to the date on the advertisements.

component and was not, as petitioner contends, a sightseeing tour. Accordingly, the receipts from the general admission after-prom cruises were properly subject to tax as admission charges to a place of amusement under Tax Law § 1105(f)(1).

J. Petitioner asserts that the advertising in the record pertained only to custom after-prom cruises and not to general admission after-proms. This contention is rejected. The advertisements in the record do not appear intended to sell custom after-prom packages to large groups. Rather, they appear focused on sales to individual students, stressing a standard set of features on the cruise and an “all inclusive” price. Furthermore, the price of \$45.00 for the general admission after-prom cruise during the audit period as testified to by petitioner’s witnesses at hearing matches the price for the after-prom cruises in the advertisements. This, too, suggests that the advertisements were intended to promote general admission after-proms and not petitioner’s customized after-prom packages where price and features were negotiated between petitioner and the group purchasing the event.

K. Petitioner also asserts that the subject assessments were “done for an untoward reason, perhaps as a vendetta against the petitioner for prior successes in disputes with the Department.” Petitioner contends that Division employee Eileen Safran was an auditor on a prior audit of petitioner and that, as a result, she harbored a grudge against petitioner (*see* Finding of Fact 24).

L. This specious contention is without merit. There is no evidence in the record establishing that Ms. Safran had a “grudge” against petitioner. Further, although she was copied on some e-mails between the auditor and his supervisor and Field Audit Management, there is no evidence that she had any other involvement in the audit at issue. Finally, there was no impropriety whatever in the auditor’s and his supervisor’s consultation with Field Audit Management.

M. The petitions of Promoceans, Ltd. and Steven Salsberg are denied and the notices of determination dated January 29, 2007 and February 1, 2007 are sustained.

DATED: Troy, New York
April 16, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE