

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

JAVA CATERERS, INC. :

DECISION

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, 1978
through May 31, 1981. :

Petitioner, Java Caterers, Inc., 473 Bayview Avenue, Inwood, New York 11696, 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, 1978 through May 31, 1981 (File No. 38136).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1984 at 1:15 P.M. Petitioner appeared by Melvyn J. Raphael, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether tables, chairs and linens were rented by petitioner for resale to its customers within the meaning and intent of section 1101(b)(4) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Java Caterers, Inc., operates a catering business preparing food and drink and furnishing waitress or waiter service. Petitioner caters affairs at personal residences, churches and temples.

2. On May 12, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1978 through August 31, 1981 for taxes due of \$6,872.44, plus interest of \$1,983.40, for a total of \$8,855.84.

On May 3, 1983, petitioner paid the above tax due to avoid any further interest charges.

3. Petitioner executed a consent extending the period of limitation for the assessment of sales and use taxes for the period March 1, 1978 through February 28, 1981 to June 20, 1982.

4. An audit of petitioner's acquisition of fixed assets and expense purchases disclosed additional taxes due of \$641.83. Petitioner agreed to this phase of the audit and executed a consent to fixing of tax and remitted a check in payment of the tax due. The unresolved portion of the audit represented the tax assessed on the rental of tables, chairs, bars and linens. Petitioner issued a resale certificate to Famous Party Suppliers, Inc. and therefore, paid no sales tax on the rentals. The rentals amounted to \$98,177.85 for the audit period and the sales tax computed thereon was \$6,872.44.

5. Petitioner rented tables, chairs, bars and linens from Famous Party Suppliers, Inc. The equipment was delivered by the vendor directly to the location where the catered affair was to be held. Petitioner used the equipment in performing its catering services and such equipment was picked up by the vendor the following day. Petitioner argued that it did not take possession of the equipment nor did it have control over its use. Petitioner concluded that its customers were the consumers of the equipment and that it merely rented the equipment for re-rental to the customers.

6. Petitioner's expense for renting the equipment was included in the charge to each customer for catering services. Petitioner collected sales tax from each customer on the total charge.

7. Petitioner maintained that the rental items are critical elements of performing catering services and on that basis were resold to its customers. Petitioner relies on Celestial Food of Massapequa Corp. v. New York State Tax Commission, 98 A.D.2d 157 to support this conclusion.

8. Notwithstanding the position taken by petitioner with respect to resale, petitioner argued that if it is required to pay the sales tax on the rentals, the tax paid should be allowed as a credit against the sales tax collected from the customer, as is the case with certain uses of tangible personal property in the contracting industry.

9. In approximately April, 1980, petitioner changed its rental procedures to avoid any further sales tax liability with respect thereto. Famous Party Suppliers, Inc. now bills the customer directly for the rental of the equipment and petitioner receives a commission.

CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law defines "retail sale" as:

"(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

B. That section 1105(d)(i) of the Tax Law imposes a tax on receipts from the sale of food and drink of any nature or of food alone, when sold by caterers.

C. That the rental by petitioner of tables, chairs, bars and linens for use in performing catering services pursuant to section 1105(d) of the Tax Law was not for resale as such or as a physical component part of tangible personal property or for use in performing services subject to tax under section 1105(c)(1), (2), (3), and (5) of the Tax Law.

Petitioner's reliance on Celestial is misplaced for two reasons. First, the types of items rented by petitioner herein were not disposable and clearly distinguishable from the products in Celestial. Moreover, the Court of Appeals reversed the Appellate Division and held that the disposable plastic and paper products, straws, stirrers and napkins are not critical elements of the product sold (Celestial Food of Massapequa Corp. v. New York State Tax Commission, __ N.Y.2d __).

Accordingly, the items rented by petitioner are subject to the tax imposed under section 1105(a) of the Tax Law. Additionally, petitioner is required to collect tax on the total selling price to its customers, including the cost for the rentals, in accordance with section 1105(d) of the Tax Law and 20 NYCRR 527.8(f).

D. That the credit provisions of section 1139(a) of the Tax Law regarding the use of tangible personal property by contractors are not applicable to petitioner's catering operations.

E. That the petition of Java Caterers, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1982 is sustained.

DATED: Albany, New York

FEB 06 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER