

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THE SEILER CORPORATION	:	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 June 1, 1979	:	
through August 31, 1982.	:	

Petitioner, The Seiler Corporation, 153 2nd Avenue, Waltham, Massachusetts, 02254, 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 June 1, 1979 through August 31, 1982 (File Nos. 39881 and 42248).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on November 1, 1984 at 2:45 P.M., with all briefs to be submitted by March 1 1985. Petitioner appeared by Ropes & Gray, Esqs., (C. Dean Dusseault, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division's issuance of an estimated assessment for the first two quarterly periods in issue was proper.

II. Whether petitioner has supported its assertions that certain sales held taxable on audit were exempt as sales to non-taxable entities or, alternatively, were exempt as sales for resale.

FINDINGS OF FACT

1. On September 9, 1982, the Audit Division issued to petitioner, The Seiler Corporation ("Seiler"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through November 30, 1979, in the amount of \$12,548.74, plus interest. By a Notice of Assessment Review dated May 2, 1983, the aforementioned assessment was reduced to \$11,140.30, plus interest.

2. On February 4, 1983, the Audit Division issued to Seiler a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through August 31 1982, in the amount of \$33,756.38, plus interest. Seiler filed timely petitions contesting each of the notices of deficiency specified hereinabove.

3. Seiler is a Massachusetts corporation which provides food management services to its customers, which include (as relevant to this proceeding) Marist College and four New York hospitals, specifically Benedictine Hospital, Corning Hospital, Founders Pavilion and St. Elizabeth Hospital ("the hospitals"). It is not disputed that each of these customers is exempt from sales and use taxation pursuant to Tax Law section 1116.

- THE HOSPITALS -

4. Seiler's arrangement with each of the hospitals is a "management fee" arrangement, under which Seiler operates the food services department, located on the premises at each hospital and provides administrative and financial services for each hospital in connection with such operations. Seiler receives a management fee for its services, which is computed either on an annual or monthly basis, or as a percentage of budgeted sales. Each of the management fee arrangements at issue was entered into through a written proposal submitted

by Seiler to each hospital. It is alleged that such written proposals contained language that the types of purchases at issue (as described hereinafter) would be made by Seiler on behalf of the hospitals. No further written contracts were entered into. The written proposals were not offered in evidence at the hearing.

5. All food service sales receipts belong to the hospitals and all expenses, including Seiler's management fee, are the responsibility of the hospitals. As a result, any ultimate profits or losses from food service operations accrue to the hospitals.

6. Seiler employees managing the food service department at each hospital are subject to some control by the hospital, and report to hospital officers as do other hospital departments. The hospitals are furnished by Seiler with a list of Seiler approved vendors, from whom, in Seiler's judgement, the best prices and services can be received. However, the hospitals may use any vendors they choose. Other than having the right to choose vendors and final approval of menus, the extent of the hospitals' control over Seiler's employees at the hospital locations was not specified.

7. Inventory purchases originate with purchase orders made out by Seiler managers at the hospital locations or, more usually, by telephone calls from such managers at each location to the particular vendors. These day-to-day inventory purchases necessary for the operation of the food service departments are initiated at the locations. No purchase orders are made from Seiler's offices in Massachusetts, except in unusual cases such as the purchase of a freezer or other large scale item. The purchase orders include the name of the hospital location and the address of the hospital location, as well as Seiler's name. Invoices from the vendors are sent to Seiler's personnel at the hospital

location, with the hospital as well as Seiler identified on such invoices. Delivery of items ordered is made by the vendors to the hospital locations and all such items, upon delivery, become hospital property. No invoices were submitted in evidence at the hearing.

8. All new vendors and continuing vendors on the Seiler - approved vendor list are given a listing of locations at which Seiler provides food management services. Seiler informs all vendors of the tax-exempt numbers of the hospitals.

9. Many of the vendors who supply products under the management fee arrangement also provide supplies to Seiler at other locations. Invoices submitted in the management fee situations do not include sales tax. In contrast, invoices submitted in other instances include sales tax on items subject to tax. Seiler maintains that advising the vendors of the tax-exempt numbers of the hospitals was sufficient to indicate that the purchases were made by or on behalf of an exempt organization, and that this was understood by the vendors.

10. As part of the management fee arrangement, Seiler provides administrative and financial services to the hospitals in connection with the operation of the food service departments. Invoices from vendors for inventories purchased, as described, are received by Seiler's managers at the hospital locations. These are checked by Seiler personnel and sent to the Seiler's home administrative offices in Waltham, Massachusetts. These multiple invoices are summarized, and give rise to another invoice which is submitted by Seiler to the hospitals on a monthly basis. This latter invoice breaks down expenses incurred by Seiler into different components. The hospitals also furnish information to Seiler concerning sales and other expenses (e.g. payroll expense, etc.), which is

consolidated with the invoice of inventory costs to produce a financial statement which is submitted to the hospitals. Seiler's invoices to the hospitals reflect the inventory items at cost with no markup for profit added to such items.

11. The payment of invoices from vendors is made in the first instance by Seiler to the various vendors as part of the overall management and financial services provided for the hospitals. Seiler thereafter receives payment, including its management fee, from the hospitals through the consolidated monthly invoices previously described.

12. The types of items purchased with regard to the hospitals and held taxable on audit include, inter alia, napkins, forks, spoons, knives, straws, bleach, detergents, other cleaning supplies, etc. The parties have, by a stipulation which is included as a part of the record, provided a complete and accurate generic description of the various items purchased and held subject to tax.

- MARIST COLLEGE -

13. The basic arrangement between Marist College and Seiler is for the operation of a board plan and dining facility at the college, and is a profit and loss ("P and L") arrangement, as distinguished from the previously described management fee arrangement. Receipts are collected by Seiler and the expenses of the operation are incurred by Seiler. As a result, any profits or losses from the operation accrue to Seiler. In addition, from time to time Seiler is asked by Marist to provide additional services in connection with certain functions held at the college. These function sales are not included in the basic P and L arrangement between Seiler and Marist, but rather represent additional services provided by Seiler. Typical function sales include luncheons,

banquets, cocktail parties, coffee breaks, etc., provided for faculty meetings, student organizations and outside groups. It is tax assessed by the Audit Division on certain function sales which is at issue herein, rather than the basic service concerning the board plan and dining facility.

14. The function sales are initiated by a request from Marist personnel made to Seiler's location manager at Marist's dining hall, describing what is needed for each particular function. Seiler's manager at Marist prepares a function specification sheet ("spec. sheet"), which is nearly identical to a regular Seiler invoice, setting forth the location of the function, the name of the group involved, Marist's name, and the costs of the function (food, labor, materials, etc.) plus an amount of profit for Seiler.

15. Seiler is compensated for its services after the functions are held. Seiler submits to the college a spec. sheet or an invoice setting forth the costs incurred by Seiler, including its profit amount for the function. These billings indicate the particular function to which they are related, so as to enable Marist to properly invoice the particular organizations which held the functions. As noted, Seiler makes a profit on the function sales, and Seiler's billing to Marist reflects this element of profit. Payment of function invoices is made to Seiler directly by the college on a monthly basis; all the invoices or spec. sheets for a particular month are consolidated, and payment is made by a single check from the college for all the invoices for that month. Seiler does not bill individuals or groups other than the college.

16. Marist College subsequently bills individuals and groups for particular functions. Additional charges may be added by the college (e.g. security, hall rental, etc.) so that Seiler's charge to Marist is only a single component of the bill sent by Marist to a given group. The college includes an amount for

profit (plus taxes where appropriate) on its bills to the various groups, which may also include a markup on the bill submitted to it by Seiler so that the college, in effect, also makes a profit on Seiler's charges. The payments made by the college to Seiler are not in any way contingent upon receipt by the college of payment from the individuals or groups associated with the particular functions.

17. Prior to the period in issue, when Seiler first began doing the function sales, Seiler directly billed the individual organizations. However, since then, Marist and Seiler have set up the existing procedure as described, under which Seiler is not involved in billing and collecting from any groups other than Marist.

18. All of Seiler's accounts receivable including the function invoices to Marist are tracked by age and, in accordance with Seiler policy, are written off as bad debts when uncollectible. Generally, Seiler measures uncollectibility as an elapsed period of one year without payment of an invoice.

19. Mr. Bernard Driscoll, Seiler's chief accountant, testified that Seiler received only checks in payment from Marist for the function sales. However, the auditor found several instances where payment appeared to have been made in cash. This discrepancy was explained by Seiler by the assertion that the auditor assumed that all invoices other than those marked "check received" were cash sales.

20. Several instances were found, on audit, where invoices from function sales were written off as uncollectible.

21. The auditor noted that function sales invoices held subject to tax did not reflect Seiler's "business account number" for Marist. The term "business account number", though not explained at hearing, presumably means the posting-

reference ledger account number assigned to Marist under Seiler's accounts receivable accounting subsystem for receivables under the basic P & L arrangement.

22. No waivers extending the applicable periods of limitation on assessment were executed by or on behalf of Seiler.

23. The assessment referred to in Finding of Fact "1" (supra) asserts sales and use tax due on recurring purchases made at the hospital locations and at Marist College, on function sales at Marist College, on sales by vending machines, on sales of vending machines and on asset sales. Seiler's chief accountant consented, at the time of audit, to the use of a test period audit and projections therefrom to compute sales and use tax due on recurring purchases at the hospitals and Marist College. A detailed audit was conducted to determine tax due on function sales, sales of vending machines and asset sales. Thus, except for the "vending machine sales", sales and use tax asserted due by such assessment was based on a test audit consented to by Seiler or a full books and records audit. There is no dispute as to the adequacy of the records maintained by Seiler. By its brief, the Audit Division concedes the amount of sales tax assessed as due on vending machine sales and withdraws the portion of the assessment pertaining thereto.

24. Included with petitioner's brief were proposed findings of fact numbered "1" through "18" which, except for the characterizations in proposed findings "8" and "9" to the effect that purchases were "made on behalf of the hospitals", have been incorporated in the foregoing Findings of Fact.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law section 1116(a)(4), sales by (except in certain instances not relevant herein) or to exempt organizations such as the

hospitals and the college noted herein are not subject to the sales and compensating use taxes imposed by Articles 28 and 29 of the Tax Law.

B. That in order for exemption to apply to the recurring purchases of the noted items used at the various hospital locations, it must be clearly established that such items were directly purchased by the exempt organizations through employees or agents of such exempt organizations properly authorized to make such purchases.

C. That the evidence presented does not clearly establish that the hospitals, either themselves or through petitioner, were the direct purchasers of the items at issue. Without restating all the facts, we note that purchases were initiated by Seiler's personnel. Vendor invoices arising therefrom were sent to Seiler's personnel at the hospital locations, were verified there by such personnel and then shipped to Seiler's home offices for payment to the vendors by Seiler. While the invoices included the particular hospital's name and address, as well as Seiler's name, such information would, of necessity, be included thereon for purposes of delivery of the supplies ordered, and does not suffice to establish that any hospital was itself or through Seiler the direct purchaser of the supplies. Seiler's written proposals to the hospitals were not offered in evidence, nor was the extent of the hospitals' control over Seiler's activities in operating the food service departments more than very generally specified. In sum, Seiler was the purchaser of record of the items at issue which were used by Seiler in providing food management operations at the various hospitals and the Audit Division's assessment of tax on recurring purchases of such items was proper.

D. That Seiler has established that the function sales at issue were made by Seiler to Marist rather than to the individual groups, with Seiler receiving payment on such sales from Marist. Accordingly, such sales by Seiler to Marist were not subject to tax.

E. That the issuance of an estimated assessment was reasonable. The assessment reflects in part the results of a detailed audit and in part the result of a test period audit and projection therefrom agreed to by petitioner.

F. That the petition of The Seiler Corporation is granted to the extent indicated in Finding of Fact "23" and Conclusion of Law "D", but is in all other respects denied and the notices of determination, as recomputed and reduced in accordance herewith, are sustained.


Dated: Albany, New York

STATE TAX COMMISSION

SEP 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER