

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CUSTOM MANAGEMENT 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 December 1, 1979 :
through August 31, 1982.

Petitioner, Custom Management Corporation, 844 Market Street, Kingston, Pennsylvania 18704, 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, 1979 through August 31, 1982 (File No. 43269).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on November 19, 1986 at 1:15 P.M., with all briefs to be submitted by March 2, 1987. Petitioner appeared by Mahler & Shaffer, Esqs. (Keith Hunter, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether certain recurring purchases made by petitioner were exempt from tax because petitioner was an agent purchasing for tax exempt entities.

11. Whether, alternatively, such purchases were exempt from tax as purchases for resale by petitioner.

FINDINGS OF FACT

1. On December 9, 1982 the Audit Division issued to petitioner, Custom Management Corporation ("Custom"), 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 \$22,558.11, plus interest. This assessment represents the results of an Audit Division field audit of the business operations of Custom.

2. Custom is engaged in the business of providing food management services for various clients at various locations. Those clients for whom Custom provided the food management services which are at issue in this proceeding include four entities, to wit: Le Moyne College, Chemung County Health Center, Van Duyn Nursing Home, and Cattaraugus County Nursing Home. During the hearing, the parties stipulated that each of these four client entities were entities which had been accorded exempt organization status for purposes of sales and use taxes pursuant to Tax Law § 1116(a)(4).

3. Prior to the hearing and as a result of discussions between Custom and the Audit Division, further evidence provided by Custom and further analysis by the Audit Division, the December 9, 1982 notice of determination was revised on October 19, 1984 and reduced thereby to \$12,175.33, plus interest. There is no dispute as to the mathematical computation of the dollar amount of tax remaining at issue (\$12,175.33). Hence, only the issue of taxability remains for resolution.

4. Petitioner's business operation may be described as follows:

(a) Petitioner contacts (or is contacted by) a potential client institution seeking petitioner's food management services. The parameters of the services to be rendered by petitioner, such as hours of operation, portion sizes, nutritional requirements (if any), menu selection, extra services, etc. are established as the result of discussions and in accordance with the potential client's requirements.

(b) After reviewing the required services, petitioner submits a bid price to the potential client with respect to providing such services. After negotiation between petitioner and the administration of a potential client a price is determined and, if acceptable to both parties, a written contract is entered into.

(c) In general, petitioner's clients provide the dining area, kitchen facilities and equipment, and an opening inventory of glasses, silverware and china for use in the food service area. The client also provides utilities (gas and electric) and pays for repairs on all equipment. Petitioner pays for any breakage or theft of inventory items during the course of providing its services, such that an inventory of items equal to the opening inventory is always maintained.

(d) After a contract is awarded, petitioner establishes its food service manager at the client's location and, with the advice of the client, hires necessary staff to carry out the food service function. Those personnel hired, as well as the food service manager, are employees of and are paid through petitioner's payroll.

(e) In the management of the food service system for a client, petitioner runs the entire operation. Petitioner orders all food supplies, prepares all meals and cleans the premises. Orders are placed by the on-site food service manager with vendors selected from a list of petitioner-approved vendors. There is no central ordering by petitioner from its home office. Where possible, petitioner's managers try to use local suppliers, as requested or required by the client.

(f) Suppliers' bills are received by petitioner's managers at the client facility. The manager sends the information from the bill to

petitioner's central headquarters after checking the quantity and quality of the items delivered. Petitioner consolidates the various supplier bills and issues checks in payment to the various suppliers. In turn, petitioner then bills each individual client for the individual items of supply ordered for that facility. Petitioner's bills to its clients for supplies purchased are for the same amount as petitioner pays to the suppliers, with no markup added by petitioner.

(g) Petitioner's individual invoice to its clients is broken down as to total costs for food (subheaded as to amounts for meat, dairy, vegetables, etc.), supplies, repairs, labor, payroll taxes, fringe benefits, vacation pay, administrative fee (petitioner's fee) and a final total operating cost figure.

(h) Petitioner's clients determine the amount collected from their customers (e.g. college students, nursing home patients, etc.) and pay petitioner from such receipts. There is no direct payment from the client's customers to petitioner, nor is there any negotiation as to petitioner's contract price with the client between petitioner and the students or patients.

5. In sum, the essence of petitioner's service to its clients is to operate the food service facility for the client and to "make it easier for the [client]". Petitioner, in this capacity, buys all necessary supplies, hires all necessary employees on its payroll, manages the food service facility including meal preparation, service and cleaning in accordance with the contract specifics for the particular client. Petitioner provides all bookkeeping services in connection with its food management service, compiles the multiple invoices from suppliers, and bills each client for its total amount of supplies based on petitioner's cost plus petitioner's management fee. Thus, petitioner acts on a cost plus management fee billing system. The client

remits one check to the petitioner, out of which remittance petitioner pays all bills for its supplies and keeps its fee. Because of the volume of purchasing, one of the advantages petitioner offers to its clients is the ability to obtain volume discounts on the purchases of foodstuffs and supplies.

6. The individual items sought to be taxed by the Audit Division as the result of the instant audit include, inter alia, paper supplies, napkins, patty paper, plastic spoons, cleaning supplies such as dish detergent, floor cleaners, degreasers, etc. These items are purchased on a recurring basis by petitioner, and are used by petitioner's employees as part of the food service and cleaning of the clients premises.

7. There are separate written contracts between petitioner and each of its individual clients setting forth the details of the various responsibilities and rights accorded to each party thereunder. There is no provision whereby a client provides petitioner with money "up front", but rather petitioner orders the needed supplies and bills the client, receiving in turn payment for those supplies,

8. Petitioner maintains no warehouse for storage of supplies. When an order is placed the client's name and address is disclosed to the suppliers, with the goods delivered directly to the client's facility and the bill delivered to petitioner's food service manager, as noted previously (see Finding of Fact "4-f").

9. Petitioner asserts that the items at issue are not properly subject to tax in that petitioner is purchasing the supplies as an agent for, or as the "alter ego" of, each of the four tax-exempt clients. In this context petitioner asserts that imposing tax on such purchases would in effect be imposing tax on purchases by exempt organizations. In the alternative

petitioner argues that the purchases in question, if made by petitioner, were made for the purpose of resale to the clients as individual items of tangible personal property.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law § 1116(a)(4), sales by (except in certain instances not relevant herein) or to exempt organizations such as the clients 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 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 based upon the evidence presented it cannot be stated that the clients, either themselves or through petitioner, were the direct purchasers of the items at issue. Noted in this context is the fact that purchases were initiated by petitioner's personnel. Vendor invoices arising therefrom were sent to petitioner's personnel at the various client locations, were verified there by such personnel and then were shipped to petitioner's home offices for payment to the vendors by petitioner. While the invoices included the particular client's name and address, as well as petitioner's name, such information would, of necessity, be included thereon for purposes of delivery of supplies ordered and such inclusion does not suffice to establish that any of the clients were themselves or through petitioner, the direct purchasers of the items in question. In sum, petitioner was the purchaser of record of the items at issue which were used by petitioner **in** providing food management

operations at the various client facilities, and the Audit Division's assessment of tax on recurring purchases of such items was proper. (See Matter of Dining and Kitchen Administration, Inc., State Tax Commn., February 3, 1987.)

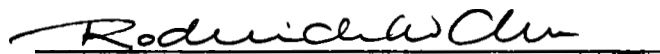
D. That the evidence does not support a conclusion that the individual items at issue were purchased and resold by petitioner to the exempt organizations. Rather it appears that the items were purchased and used by petitioner's personnel as part of and in the course of the food management services provided by petitioner to the various clients. Accordingly, petitioner's assertion that the purchases were made for resale to petitioner's clients is rejected.

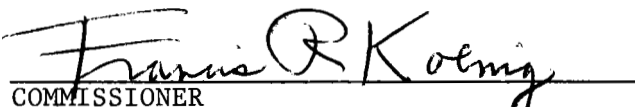
E. That the petition of Custom Management Corporation, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 9, 1982, as later reduced (see Finding of Fact "3") is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987


PRESIDENT


COMMISSIONER


COMMISSIONER