

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THE FOOD GALLERY, 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 December 1, 1979	:	
through February 28, 1983.	:	

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Petitioner, The Food Gallery, Inc., 215 West 29th Street, New York, New York 10001, 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 February 28, 1983 (File No. 53873).

A 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 January 17, 1986 at 9:00 A.M. Petitioner appeared by its President, Richard Ferrugio. The Audit Division appeared by John P. Dugan, Esq., (Irwin Levy, Esq., of counsel).

ISSUE

Whether certain equipment rented by petitioner was for resale to its customers in accordance with the provisions of section 1101(b)(4) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, The Food Gallery, Inc., operated a catering business that prepared food and drink and furnished service personnel.
2. On May 7, 1984, 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 December 1, 1979 through February 28,

1983 for taxes due of \$10,324.76, plus interest of \$3,015.93, for a total of \$13,340.69.

3. Richard Ferrugio, on behalf of petitioner, executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1979 through February 28, 1981 to June 20, 1984.

4. On audit, the Audit Division disallowed nontaxable sales of \$62,950.00 resulting in additional sales taxes due of \$5,142.60. A review of purchase invoices disclosed that petitioner failed to pay a sales or use tax on purchases in the following expense accounts:

a) equipment rental	\$3,807.13
b) office supplies	190.91
c) marketing/promotion	433.12
d) kitchen supplies	751.00
Total	<u>\$5,182.16</u>

5. Following a pre-hearing conference, the Audit Division issued a Notice of Assessment Review which revised the taxes due on the above notice to \$5,182.16. Petitioner had substantiated the nontaxable sales disallowed on audit.

6. At the hearing, petitioner conceded that it was liable for the tax determined due on the purchases in Finding of Fact "4" (b), (c) and (d). The only unresolved portion of the audit was the tax assessed on the equipment

rentals.

7. For certain functions, petitioner rented equipment such as tables, chairs, china, linen, silverware and glassware from different equipment rental companies. The equipment was delivered by the vendor directly to the location where the catered affair was to be held. Petitioner's employees set up and dismantled the equipment as required for the affair. The equipment was picked up the following day by the rental company.

8. Petitioner's invoices to its customers showed a separately stated charge for the equipment. Petitioner collected sales tax from the customer on the total charge for the affair including food, drink, equipment, service and extras, such as flowers. Petitioner usually added a markup to its cost for the equipment rental.

9. Petitioner took the position that its customers were the actual consumers or users of the equipment and that it merely rented the equipment for re-rental to the customers. The Audit Division maintained that the equipment was used by petitioner in performing its catering services rather than by the customer and that such use precluded any resale or re-rental of the equipment.

#### CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property. The term "retail sale" is defined in section 1101(b)(4) of the Tax Law, as:

"(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such... 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...."

In order to qualify for the resale exclusion in the Tax Law, tangible personal property must be purchased exclusively for resale (Matter of Micheli Contracting Corp. v. State Tax Commission, 109 A.D.2d 95). The term "sale and purchase" includes rentals (Tax Law section 1101[b][5]).

B. That section 1105(d)(i) of the Tax Law imposes a tax upon:

"The receipts from every sale of... food and drink of any nature... when sold... by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to ... customers..."

C. That given the nature of petitioner's business, the tables, chairs, linens, and silverware, etc. were for use by petitioner in performing catering

services pursuant to section 1105(d) of the Tax Law and not exclusively for re-rental to the customer as such. Accordingly, the equipment rented by petitioner was not for resale under section 1101(b)(4)(i)(A) or (B) of the Tax Law. (Matter of Java Caterers, Inc., State Tax Commission, February 6, 1985). Petitioner also must collect sales tax on the separately stated charge to the customer for equipment rental irrespective of the fact that the cost of the rentals is a taxable purchase to petitioner. (See 20 NYCRR 526.5[e]).

D. That the petition of The Food Gallery, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 7, 1984, as amended by the Notice of Assessment Review, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986

Richard W. Allen  
PRESIDENT

Francis R. Koanig  
COMMISSIONER

Mark J. Treadwell  
COMMISSIONER