STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
D-M RESTAURANT CORP. AND ANTHONY MAY AND BERNARD DALY, AS OFFICERS	:	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, 1983 through December 31, 1985.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 2, 1990 with respect to the petition of D-M Restaurant Corp. and Anthony May and Bernard Daly, as officers, c/o Top of the Park, 1 Gulf & Western Plaza, New York, New York 10023, 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, 1983 through December 31, 1985 (File No. 805371). Petitioners appeared by Gerard A. Navagh, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

The Division of Taxation filed a letter in lieu of a brief on exception. Petitioners resubmitted their brief filed at hearing.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly determined that D-M Restaurant should have paid sales tax on its acquisition of linen and tableware which it used in its restaurant/catering business.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1" and "7" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" to read as follows:

> During the period in issue, petitioner D-M Restaurant Corp. operated a restaurant named the Rainbow Room at Rockefeller Center in New York City. The restaurant whichwas open to the public also had rooms available for private parties.[1]
>
> In June 1985, the Division of Taxation ("Division") began a field audit of the restaurant's books and records. The examination led the Division to conclude that the restaurant's records were sufficient to warrant an audit method which utilized all of the restaurant's records within the audit period.
>
> In the course of the audit, the Division found that the restaurant was conducting its business pursuant to a lease dated December 1, 1974 between itself and Rockefeller Center, Inc. In addition to providing space for a restaurant, the lease stated that the landlord was to furnish the corporation with certain personal property (characterized as "Premises Equipment") consisting of "fixtures, kitchen and other equipment, tables, chairs, furniture, furnishings, decorations, draperies, floor coverings, utensils, linen, silverware, glassware, chinaware and other personal property and restaurant paraphernalia". The lease further provided that the restaurant was to be responsible for breakage, damage or other destruction of the equipment except for ordinary wear and tear. In the event of breakage or other damage, the tenant was required to either replace the item or pay the landlord the replacement value.
>
> The Division considered the lease payments taxable to the extent they were for the rental of tangible personal property. However, the restaurant's lease did not segregate the amount spent for office space from the amount spent on the rental of tangible personal property. Therefore, in order to compute the amount of tax due, the Division estimated that 4% of the gross rental amount was attributable to the leasing of tangible personal

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[1] The Administrative Law Judge's finding of fact "1" read as follows:

> "During the period in issue, petitioner D-M Restaurant Corp. operated a restaurant which was open to the public. The establishment also had rooms available for private parties."

We have modified this fact to reflect the record in more detail.

property. This percentage was obtained from an agreement reached between the parties at a conference of the former Tax Appeals Bureau following a prior audit of the restaurant. The Division determined that tax in the amount of $7,960.55 was due on the rental of tangible personal property by multiplying 4% of the corporation's gross rent payments by the applicable tax rate.

When customers made arrangements for an affair at the restaurant, they were asked if they wished to have flowers. If flowers were desired, customers could either make their own arrangements with a florist to obtain flowers or, at the customers' request, the restaurant made arrangements to provide the type of flowers desired. At the conclusion of the affair, the customer had the right to remove the flowers.

When the restaurant obtained flowers at the request of its customer, it was the restaurant's practice to give the florist a resale certificate. When the restaurant prepared its bills to the customer, the flowers would be separately itemized and contain a provision for sales tax. The restaurant maintained records of which flowers were ordered for which private party. On audit, the Division adopted the position that the restaurant should have paid tax on its purchase of the flowers and, therefore, tax in the amount of $8,255.13 was due.

We modify finding of fact "7" to read as follows:

> Generally, the restaurant used its own cups, saucers and linens at private parties. However, if it was requested by a customer, the restaurant rented the specific type of linen, utensils, cups and saucers which a customer desired for a particular affair. On these occasions, the restaurant issued resale certificates to its supplier. When the restaurant prepared its bill to the customer, there would be a charge on the invoice for the additional items that were supplied with a provision for sales tax. At the conclusion of an affair, a supplier would return to the premises to recover the items. The restaurant maintained records indicating which items were provided to which customer. In the course of the audit, the Division concluded that petitioners should have paid tax to their supplier on their rental of linens, cups, flatware, crystal and similar items, resulting in a finding that tax was due in the amount of $665.73. $501.88 of this amount was for the "special linens."[2]

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[2] We modified finding of fact "7" of the Administrative Law Judge's determination by adding the last sentence in order to more fully reflect the record.

The balance of the assessment, $234.64, arose from alleged consumption of beverages by employees. At the hearing, the Division conceded this portion of the assessment.

In its field audit report, the Division referred to each of the foregoing findings as use tax due.

On August 18, 1986, on the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to D-M Restaurant Corporation d/b/a Rainbow Room which assessed sales and use taxes for the period March 1, 1983 through December 31, 1985 in the amount of $17,116.05 plus interest of $3,162.00 for a total amount due of $20,278.05. On the same day, the Division issued separate notices to petitioners Bernard Daly and Anthony May, as officers of the restaurant, which assessed the same amount of tax and interest which had been assessed against the restaurant.

Periodically, petitioners replaced the china, glass, linens and silverware which had initially been furnished by the landlord. Upon replacement, title remained with the landlord. When it was required to replace an item, the corporation paid sales tax. On larger items, the corporation occasionally shared the cost of the item with the landlord or the landlord paid for the item.

The restaurant paid New York City commercial occupancy tax on its rental payments to the landlord.

OPINION

The only matter at issue on the exception taken by the Division of Taxation (hereinafter the "Division") concerns the taxability of petitioners' rental of linens and tableware. The amount of the assessment against petitioners for these items is $665.73.

The Administrative Law Judge, based on Matter of Levine v. State Tax Commn. (144 AD2d 209, 534 NYS2d 522) determined that the provision of special linens and tableware, e.g., cups, saucers and similar items, was separate and distinct from petitioners' regular business operation and that such items were purchased for resale by petitioners. The Administrative Law Judge cancelled the assessment in the amount of $665.73.

The Division, on exception, asserts the Administrative Law Judge erred in failing to distinguish the facts here from those in Levine (supra). The Division argues that Levine is distinguishable because unlike flowers, linens and tableware are an integral part of the restaurant's catering service and were purchased by petitioners in connection with such business and not for resale. Hence, the purchases were taxable under Tax Law § 1105(d).

On exception, petitioners reassert their position at hearing (Tr., p. 14; post hearing brief, p. 12 [resubmitted on exception]) that the linens they rented are exempt from tax by virtue of Tax Law § 1105(c)(3)(ii) which excludes laundering services from the imposition of sales tax. Stated differently, petitioners assert that they purchased a laundry service which is a purchase excluded from sales tax (Tax Law § 1105[c][3][ii]).

Petitioners rely on Matter of Atlas Linen Supply Co. v. State Tax Commn. (149 AD2d 824, 540 NYS2d 347, lv denied 74 NY2d 616, 550 NYS2d 276) in which the court affirmed the decision of the former State Tax Commission that receipts from supplying of linen are not subject to tax as the rental of tangible personal property but are excluded from the imposition of sales tax as the furnishing of laundry services under Tax Law § 1105(c)(3)(ii).

Petitioners also assert that the cups, saucers and other special items were purchased for resale to their customers.

We affirm in part and reverse in part the determination of the Administrative Law Judge for the reasons set forth below.

We deal first with the issue of the linens. While we agree with the conclusion of the Administrative Law Judge that petitioners' acquisition of such linens was not subject to tax, we do so for a different reason.

Petitioners are correct in their assertion that their acquisition of linens is not the rental of tangible personal property but the purchase of a laundry service which is excluded from tax (Matter of Atlas Linen Supply Co. v. State Tax Commn., supra; see also, Matter of Linen Sys. for Hosps., Tax Appeals Tribunal, August 24, 1989). Accordingly, that portion of the $665.73 related to special linens is cancelled. This still leaves the question of the taxability of the other

special items which include tableware, i.e., cups, saucers, etc., with which we deal next. On this issue we reverse the determination of the Administrative Law Judge.

Tax Law § 1105(a) imposes a tax upon every retail sale of tangible personal property unless otherwise excluded, excepted or exempted (Tax Law § 1105[a]). A "retail sale" is defined in general terms as "the sale of tangible personal property to any person for any purpose" (Tax Law § 1101[b][4][i]).

There are two exclusions from this definition. We find that neither is applicable in this case.

The first exclusion is the purchase of tangible personal property "for resale as such" or as a physical component part of tangible personal property (Tax Law § 1101[b][4][i][A]).

We disagree with the Administrative Law Judge and conclude that Matter of Levine does not control because the facts are significantly different here. In Levine, it was clear that the customers were granted every right of ownership and directed the disposition of the flowers. Petitioner has not proved that its customers had right of ownership and control of the disposition of the tableware.

The second exclusion to the definition of retail sale is the purchase of tangible personal property for use in performing specified taxable services where the property becomes a part of the property upon which the taxable service is performed or where the property is "later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax" (Tax Law § 1101[b][4][i][B]). The taxable services referred to are those in Tax Law § 1105(c)(1) information services, (2) printing, (3) installation of tangible personal property, and (5) maintaining, servicing or repairing real property. Petitioner is not engaged in any one of the enumerated services and, thus, does not come within the exclusion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted in part and is denied in part;

2. The determination of the Administrative Law Judge is modified to the extent that petitioners' rental of tableware, other than linens, is held subject to tax resulting in tax due of $163.85, but the determination is otherwise affirmed;

3. The petition of D-M Restaurant Corp. and Anthony May and Bernard Daly, as Officers is granted to the extent indicated in conclusions of law "B" (as modified by paragraph "2" above), "C," "D," and "E" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination dated August 18, 1986, in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
April 18, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner