STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ELEGANT AFFAIRS, INC. :

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, 1999 through February 28, 2002. :

In the Matter of the Petition :

of :

ANDREA CORREALE :

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, 2000 through February 28, 2002. :

In the Matter of the Petition :

of :

SCOTT SCHNEIDER :

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, 2000 through February 28, 2002. :

DETERMINATION
DTA NOS. 820599, 820600 AND 820601

Petitioner, Elegant Affairs, Inc., 110 Glen Cove Avenue, Glen Cove, New York 11542, 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, 1999 through February 28, 2002.

Petitioner, Andrea Correale, 110 Glen Cove Avenue, Glen Cove, New York 11542, 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, 2000 through February 28, 2002.

Petitioner, Scott Schneider, 110 Glen Cove Avenue, Glen Cove, New York 11542, 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, 2000 through February 28, 2002.

A consolidated hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 2, 2006 at 10:30 A.M. and was concluded at the same location on February 3, 2006 at 10:00 A.M., with all briefs to be submitted by August 14, 2006, which date began the six-month period for the issuance of this determination. Petitioners appeared by Getzel, Schiff & Ross, LLP (Jeffrey A. Getzel, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (Michael Hall, Esq., of Counsel).

ISSUES

I. Whether the Division of Taxation ("Division") properly assessed sales and use taxes upon the purchases and rentals of certain equipment and supplies by Elegant Affairs, Inc. ("Elegant Affairs") which were subsequently provided to its customers.

II. Whether the Division properly assessed sales and use taxes upon Elegant Affairs' purchases and installations of certain improvements to its business premises.

III. Whether penalties assessed by the Division upon petitioners should be abated.

FINDINGS OF FACT

1. Elegant Affairs is an off-premise caterer which, in addition to selling food and beverages and preparing the food and beverages sold, also rents party equipment and other party paraphernalia.

2. While the case was assigned to the auditor in February 2002, the actual audit did not commence until May 2002. On May 2, 2002, the auditor made an unannounced visit to Elegant Affairs' business premises at 110 Glen Cove Avenue, Glen Cove, New York. Therefore, she did not see the kitchen or the areas where Elegant Affairs stored the items which it rented to its customers. In addition, the auditor did not see or ask to see customer proposals or customer contracts.

Prior to having been assigned this audit, the auditor had performed audits on approximately four caterers. None of these audits involved an off-premise caterer.

3. On May 7, 2002, the auditor mailed an appointment letter to Elegant Affairs in which, among other things, she requested that records be produced for audit. The records requested included: sales tax returns and worksheets, canceled checks, Federal income tax returns, New York State corporation tax returns, a general ledger, a general journal and closing entries, sales invoices, exemption documents, chart of accounts, fixed asset purchase invoices, expense purchase invoices, merchandise purchase invoices, bank statements and deposit slips, cash receipts journal and cash disbursement journal. While the audit was postponed on a number of occasions at the request of petitioners or their representative, the records requested by the auditor were eventually produced with the exception of a few expense invoices, fixed asset invoices and bank statements.

4. Sales records were deemed adequate for the audit period. Gross sales per books were reconciled to sales and Federal tax returns. Bank deposits were transcribed and found to be in substantial agreement with books and records. Therefore, gross sales were accepted as reported. On March 4, 2003, petitioners' representative and the auditor executed a Test Period Audit Method Election whereby it was agreed that a test period audit method would be utilized in the audit of sales and recurring expense purchases. The test period selected was September 1, 2000 through November 30, 2000 and September 1, 2001 through November 30, 2001. The audit report stated that two test periods were utilized because in or about January 2001, Elegant Affairs changed its accounting system.[1] Prior to the change, Elegant Affairs reported all of its sales in a general sales account. After the change in accounting methods, Elegant Affairs became very specific in how it was reporting its income which included breaking out income derived from specific rental items.

A review of the taxable sales resulted in additional taxable sales of $17,288.71 with sales tax due thereon in the amount of $1,469.54. This assessment resulted from the disallowance of some claimed nontaxable sales and from some jurisdiction (tax rate) errors and from tax not having been charged on credit card handling fees.

5. A detailed review of asset acquisitions determined that fixed assets totaling $73,825.76 had been purchased without payment of tax, resulting in additional tax due of $6,275.19. Fixed assets included rental catering equipment, office equipment, furniture and fixtures. Rental catering equipment consisted of tables, chairs, kitchen supplies, party props, tents, dance floors, glassware, trays and tablecloths. Some of this portion of the assessment resulted from tax not

[1] While the Field Audit Report states that the change in accounting method occurred in or about January 2001, the auditor, in the course of her testimony at the hearing, indicated that Elegant Affairs changed its accounting system in or about April 2000.

having been paid to out-of-state suppliers. For some of the asset acquisitions, Elegant Affairs claimed that they were installed as capital improvements at its business premises. These items included a walk-in freezer, flooring and a surveillance monitoring system. Petitioners' representative disputed portions of this assessment on the basis that Elegant Affairs was renting this equipment to its customers.

6. A review of expense purchase records was performed (expense records were deemed to be adequate by the auditor) utilizing the test period method (the sales tax quarter September 1 through November 30, 2001 was used). Additional taxable expense purchases of $461,455.29 were found by the auditor with tax due thereon of $39,223.70. While a few errors resulted from incorrect tax rates having been charged by suppliers, most of the assessment was attributable to tax not having been paid by Elegant Affairs which, instead, provided resale certificates to its suppliers.

The auditor identified each invoice for which sales tax was not charged. She computed an error rate by taking the additional tax found to be due and dividing it by the base amount of purchases for the test period. The error rate was then multiplied by the total purchases in the account for the entire audit period to determine the tax due for that account.

7. During the audit, the auditor found in Elegant Affairs' records, a memorandum dated December 1, 1998 from one of its vendors, P.J. McBride, Inc., which indicated that this vendor would not accept resale certificates on equipment purchased and rented by Elegant Affairs because the vendor did not consider these purchases and rentals to be for resale. P.J. McBride, Inc. provided Elegant Affairs with a copy of a State Tax Commission decision, ***Matter of The Food Gallery, Inc.*** (State Tax Commission, June 17, 1986) which set forth a caterer's obligation to pay tax on its purchases and rentals. Elegant Affairs thereafter paid sales tax on future

purchases and rentals from P.J. McBride, Inc., but took credit on its sales tax returns for the tax paid.

8. As a result of the auditor's findings, the Division, on February 6, 2004, issued a Notice of Determination to Elegant Affairs assessing additional sales and use taxes in the amount of $46,968.43, plus penalty and interest, for a total amount due of $82,767.26 for the period June 1, 1999 through February 28, 2002.

On March 1, 2004, the Division issued notices of determination to Scott Schneider and Andrea Correale, each of which assessed additional sales and use taxes in the amount of $24,075.76, plus penalty and interest, for a total amount due of $40,377.26 for the period December 1, 2000 through February 28, 2002. The notices of determination advised Mr. Schneider and Ms. Correale that they were being assessed as officers or responsible persons of Elegant Affairs. Neither of these petitioners contests the Division's determination that each was an officer or responsible person of Elegant Affairs during the period at issue herein.

9. At a conciliation conference held by the Division's Bureau of Conciliation and Mediation Services Bureau, documentation was provided by petitioners to show that tax had been paid on an item of equipment (a "Hartford Cooler") and that two other fixed assets ("Ringside Concrete" and "Viking Ironworks") were capital improvements. Accordingly, a Conciliation Order (CMS No. 202909) was issued which reduced the assessment against Elegant Affairs from $46,968.43 to $45,018.87, plus penalty and interest computed at the applicable rate. Conciliation orders (CMS No. 202911 and 202910) were also issued to petitioners Scott Schneider and Andrea Correale, respectively, which reduced the assessments against each of these petitioners from $24,075.76 to $22,296.20, plus penalty and interest computed at the applicable rate.

10. Penalties were assessed by the auditor because Elegant Affairs had been notified by means of the memorandum from P.J. McBride, Inc. (***see***, Finding of Fact "7") as to its obligation to pay sales tax on equipment purchased or rented. However, Elegant Affairs continued to claim credits for tax paid on such purchases and rentals of equipment.

11. Laura Wootton is employed by Elegant Affairs as an event planner and salesperson who sells catered parties to Elegant Affairs' customers. After the initial meeting with the customer, she develops a proposal or a contract which, in addition to the food and beverages to be provided by Elegant Affairs, also includes a detailed list of all rental items recommended for the particular event such as china, glassware, flatware and linens. Ms. Wootton does not make the determination whether items obtained by Elegant Affairs (either by purchase or rental) are for resale and whether sales tax is properly due upon Elegant Affairs' purchase or rental of these items; such a determination is made by Elegant Affairs' operations department. Under each category of rental items, the proposal or contract is further itemized as to the number of pieces to be provided by Elegant Affairs. Prior to signing the contract, the customer may choose to provide such items himself or may choose to obtain the items from another rental company. It is the customer's choice as to whether or not to rent the items from Elegant Affairs.

For some of the parties sold by Ms. Wootton, customers have chosen to have Elegant Affairs provide food and beverages without any rental equipment. Food provided by Elegant Affairs is served on its trays, platters, bowls, etc., and decorative props such as ice buckets, wine buckets and cake trays are also provided by Elegant Affairs. These serving pieces are not detailed on the proposals provided to the customer; a flat fee is charged for this equipment. Ms. Wootton indicated that rental items are anything that the customer uses such as tables, chairs, linens, plates and silverware and the customer is charged a rental fee according to the number of

pieces used. The rental items are not rented to the customer on a per person basis but on a per piece basis. The customer is not charged an additional amount if items such as plates, glasses or cups are broken. No one instructs the customer or his guests or invitees as to how the rental items are to be used. This is true whether Elegant Affairs owns the equipment or has to obtain it from another vendor.

Since Elegant Affairs owns no party tents, if a customer requests a tent, Elegant Affairs obtains one from a vendor such as Elite Party Rental who will erect the tent a day or two before the party. P.J. McBride, Inc. is another vendor from whom Elegant Affairs rents tents, draping and flooring. In these instances, Elegant Affairs charges the customer for the rental and charges sales tax to the customer. In one instance, P.J. McBride, Inc. charged Elegant Affairs the sum of $38,000.00 for the rental of a tent for a party for a customer; Elegant Affairs then charged the customer $55,442.30 which included Elegant Affairs' profit.

On an invoice dated September 2, 2001 included in Elegant Affairs' petition, the customers were charged $.65 each for glasses referred to as "Citation Stems" and "High Balls" and $.95 each for glasses denoted as "Champagne Flutes," "Martini Glasses," "Water Glasses," "White Wine Glasses" and "Red Wine Glasses." At this particular event, a total of 2,275 glasses were provided to the customers at a total charge of $2,038.75 for the glasses alone.

12. China and glassware (along with certain other items) are removed unwashed from the customer's premises right after the party. Some of the items such as tables and chairs rented by Elegant Affairs to its customers are, on occasion, left for a day or two after the party, often at the customer's request.

13. Benedetta Kliger is a long-time customer who has contracted with Elegant Affairs to handle 25 to 30 parties. While most of the parties included charges for rental equipment, an

invoice for a party occurring on December 2, 2000 charged for food only; there were no rentals included. For one of her parties (December 14, 2000), Ms. Kliger rented a tent and chairs from a company known as Parties To Go who billed Ms. Kliger directly. For other parties, Ms. Kliger rented these and other items from Elegant Affairs.

14. Until May 23, 2005, Scott Schneider was a 50 percent shareholder of Elegant Affairs. Prior to his affiliation with Elegant Affairs, Mr. Schneider, a graduate of the Culinary Institute of America, was a freelance chef and an off-premise caterer in New York City. He then started his own business and later became employed by Elegant Affairs from its inception. Originally, he prepared all of the food for Elegant Affairs and later became an owner along with Andrea Correale. Ms. Correale started Elegant Affairs but initially subcontracted food preparation to Mr. Schneider's company.

Mr. Schneider's duties with Elegant Affairs included cooking, running parties, payroll, insurance issues and buying equipment; he was involved in all aspects of the business with the exception of dealing with customers.

When conducting a party at a customer's home or business premises, Elegant Affairs often must bring equipment and make a kitchen in the customer's garage or in a tent. This equipment is not considered by Elegant Affairs to be rentable catering equipment since the customer or his guests do not use any of it. Among the equipment owned by Elegant Affairs which it uses in the performance of its catering services and which it does not rent to its customers are: portable kitchen, cooking and food preparation equipment, serving pieces, catering props and decorative items. When such equipment is purchased by Elegant Affairs, sales tax is paid upon purchase.

A kitchen fee is charged and Elegant Affairs brings what is deemed necessary for the particular needs of the customer. An equipment fee is charged by Elegant Affairs for these items

which include serving pieces such as trays, bowls, etc. Elegant Affairs owns these items and uses them over and over at various functions. While an equipment fee is charged to the customer for the food preparation equipment and serving pieces, these items are not delineated on the invoice provided to the customer.

15. Elegant Affairs was not always in the rental business. In 2000 and in years prior thereto, the business was located in a much smaller facility, i.e., a 1,000-square foot facility in Locust Valley, New York. At that time, Elegant Affairs owned plates and flatware which it rented out to its customers. Petitioner Scott Schneider indicated that since the rental of these items was the most profitable part of the business, he and petitioner Andrea Correale decided to move Elegant Affairs into a larger space in order to further the rental aspect of the business. In order to operate a rental business, it was necessary to employ additional staff to load and unload rental equipment such as tables, chairs and bars. Larger trucks were necessary to transport the equipment. Special equipment such as that necessary to polish silverware had to be purchased.

When Elegant Affairs purchases rentable catering equipment, it does not pay sales tax on it because, in the opinion of petitioners, it is intended for resale to its customers. In some instances, when a vendor, on its invoice to Elegant Affairs, charged sales tax on equipment which Elegant Affairs deemed to be rentable catering equipment, Elegant Affairs would cross out the sales tax on the invoice and pay only the actual selling price of the equipment and not the total price (including tax) set forth on the invoice. An example of this practice is evidenced by an invoice from Bar Boy Products to Elegant Affairs, dated September 6, 2000, by which Elegant Affairs purchased 24 cases of glassware. The selling price for the glassware was $1,365.12, plus sales tax of $116.04, for a total invoiced price of $1,481.16. Elegant Affairs

crossed out the $116.04 and paid only $1,365.12 and noted on the invoice that a tax exempt certificate was on file.

Scott Schneider indicated that approximately 28 to 30 percent of Elegant Affairs' business came from the rental of equipment owned by Elegant Affairs and approximately 15 to 18 percent from the rental of other equipment. Therefore, over 40 percent of Elegant Affairs' total business is from the rental of equipment to its customers. The balance of its business is from catering (food, beverages and staff).

16. At about the time that Elegant Affairs moved to its new, larger location at 110 Glen Cove Avenue, Glen Cove, New York in or about 2000, changes were made to its general ledger to include rentals as well as food, beverages and staff.

Elegant Affairs' business premises consist of an approximately 6,000-square foot facility in the main building. On the first floor, approximately 1,500 square feet are devoted to offices, a display area (china, napkins, etc.), and tasting area. Behind this area is a warehouse of approximately 1,500 square feet where linens, plates, china and other equipment is stored. Downstairs is a 3,000-square foot state-of-the-art kitchen with refrigerators and freezers. Behind the main building is a 1,000-square foot food shed and two metal containers where large rental items such as tables, chairs, ovens and hot boxes are stored.

At the time that Elegant Affairs moved to its new location in Glen Cove, New York, major changes had to be made at the facility since it previously was a plumbing warehouse. New walls, offices, heating and cooling system, sprinklers, electrical system, tile floors in the basement, floor drains, pumps and grease traps were added at a cost of approximately

$20,000.00. The premises at 110 Glen Cove Avenue are rented by Elegant Affairs from an affiliated corporation.[2]

17. There are several items purchased by Elegant Affairs which it contends were capital improvements and upon which it asserts sales tax was improperly assessed by the auditor. These items are as follows:

a. An invoice from American Restaurant Equipment dated June 2, 1999 in the amount of $5,065.00 for a walk-in freezer. It must be noted that on the auditor's schedule entitled "Listing of Invoices with Tax Change by Audit Area Subtotaled By" (hereinafter "Listing of Invoices"), a six-page document which is part of the workpapers and schedules prepared by the auditor, an invoice in the amount of $5,000.00, dated November 15, 2000, was assessed tax by the auditor (Record No. 224). Her comments regarding this invoice stated the information had been taken from the building improvement worksheet and that no invoice was presented to support a fixed asset acquisition. Petitioner Scott Schneider indicated that a concrete slab was poured on which the freezer was installed.

b. Petitioners presented a series of invoices from Daltile Corporation issued in February and March 2001 which petitioner Scott Schneider stated were for the tile for a new floor in the basement at Elegant Affairs' premises. Tax was charged on each of these invoices. Petitioner Scott Schneider indicated that the tile floor was installed by Edward Gomez. In the auditor's Listing of Invoices, there are three invoices (February 14, 2001, June 1, 1999 and March 19, 2001) totaling $7,000.00. Petitioner Scott Schneider explained that these

[2] Along with its Reply Brief, petitioners submitted a copy of the lease agreement. Since petitioners did not seek additional time, at the conclusion of the hearing, to submit the lease (time was provided to petitioners to submit evidence regarding a walk-in freezer only; however, no additional evidence was submitted) its provisions shall not be considered as evidence in the record. The fact that Elegant Affairs leased the premises from an affiliated corporation was derived from the testimony of petitioner Scott Schneider.

sums were paid by Elegant Affairs to Mr. Gomez for the installation of 3,000 square feet of graded tile with two floor drains in the kitchen of Elegant Affairs's premises.

c. Petitioners presented an invoice from Home Theatre High-Tech Audio, dated May 14, 2001, in the amount of $7,795.00, $6,195.00 of which was for equipment and $1,600.00 of which was for "installation of sound and video." On the first line of the invoice was a charge of $1,000.00 for "prewire and labor." Petitioner Scott Schneider explained that this invoice was for a surveillance monitoring system which was installed in the building to prevent theft as well as for a sound system built into the walls of the premises for tastings and customer-related uses. The 27-inch TV monitor was mounted onto the wall and speakers were cut into the ceiling and mounted. In addition, a volume control was mounted in the wall to adjust the volume of the speakers. On the auditor's Listing of Invoices (Record No. 160), the auditor indicated that the taxable amount of this invoice was $6,795.00. Her comments were that only the wiring is a capital improvement in the installation of a security system; other materials and equipment are taxable.

18. Petitioners presented other invoices from various vendors for which they contend that they are entitled to a credit for sales tax paid. These include:

a. An invoice dated March 17, 1999 from Bar Boy Products in the amount of $5,300.00, plus sales tax of $450.00, for a total of $5,740.00.[3] The invoice indicates that an Amex (American Express) payment of $1,000.00 was paid with a balance due thereon in the amount of $4,740.00. Petitioner Scott Schneider explained that the invoice was for a banquet box for seated events used by Elegant Affairs to keep plated meals at an acceptable temperature. The auditor's Listing of Invoices (Record No. 192) indicated that tax was

[3] Apparently, the total of the invoice should have been $5,750.00.

assessed on this $1,000.00 downpayment. The explanation stated that no invoice was presented for fixed asset acquisition;

b. Petitioners indicate that the auditor's Listing of Invoices (Record No. 196) includes an assessment of sales tax on a $4,500.00 invoice dated November 21, 2000 from Cement Work. Petitioners contend that an invoice from Ringside Concrete shows that the charges were for delivery of cement used for a capital improvement. An invoice from Ringside Concrete Corp., dated January 29, 2001, was an exhibit attached to petitioners' petitions;

c. Petitioners indicate that the auditor's Listing of Invoices (Record No. 183) assessed tax in the amount of $170.00 on the sale of a hot dog truck in the amount of $2,000.00. Petitioners contend that this was the sale of a vehicle and, therefore, tax is paid by the purchaser at the time of registration. No documentation or testimony was presented to support petitioners' position;

d. Petitioners state that the auditor's Listing of Invoices (Record No. 223) indicates that tax was assessed in the amount of $463.25 on an invoice dated November 14, 2000 in the amount of $5,450.00, which the auditor indicates was not an invoice for a fixed asset acquisition. As an exhibit to their petitions, petitioners attached an invoice in the amount of $5,450.00 which indicates that "2 steam kettle and Swiss braiser and sink" were purchased. Petitioners maintain that these items are permanent pieces of kitchen equipment which are permanently installed and are, therefore, capital improvements not subject to tax; and

e. Petitioners presented a series of eight invoices from A-1 Tablecloth Company for tablecloths purchased by Elegant Affairs which were subsequently rented to customers and, accordingly, for which petitioners claim a credit for sales tax paid thereon.

19. Andrea Correale is the president of Elegant Affairs. She has a bachelor's degree in hotel restaurant administration from New York Tech. Prior to graduating, she started a company called Rent-a-Waitress which supplied waitresses to people who were having parties in their homes. Often, these people had hired a caterer which did not supply wait staff. In addition to homeowners, Ms. Correale solicited business from caterers who did not employ wait staff. By the time she graduated from college, she had a customer base of approximately 500 "very wealthy North Shore customers in Long Island." Later, she decided to start an off-premise catering business, but since she had no real culinary background, she partnered with Scott Schneider, a graduate of the Culinary Institute of America.

Approximately a year after starting the business with her former partner, Scott Schneider, Ms. Correale and Mr. Schneider realized, after reviewing the year-end numbers of the business, that they had spent a large amount of money with rental companies. At that point, Ms. Correale decided that Elegant Affairs should do some of the rentals itself. The company then applied for and obtained a business loan and used the proceeds to purchase "some of the basic rentals," tables, chairs, china, flatware, etc., and began renting it to its customers. Because Elegant Affairs did not own everything needed by its customers for their parties, other rental companies were still utilized.

Ms. Correale described Elegant Affairs as an off-premise catering company whose main business is supplying food for parties. However, she stated that "we also have a rental division."

Ms. Correale indicated that some customers, after receiving a proposal from Elegant Affairs, choose to handle certain aspects of the party themselves, which may include, renting items from other rental companies.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a tax on "every retail sale" of tangible personal property in the State. Pursuant to Tax Law § 1101(b)(4)(i)(A), a sale for resale is not a retail sale and is, therefore, not subject to tax. A rental is considered to be a retail sale (Tax Law § 1101[b][5]).

B. 20 NYCRR 527.8 provides, in pertinent part, as follows:

> (f) Caterers. (1) Sales by caterers. (i) All charges by caterers selling food or drink who provide assistance in serving, cooking, heating or other services after delivery are taxable.
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> * * *
>
> (2) Purchases by caterers. (i) Self-use. Taxable tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to tax. Examples of such taxable property are: tables, tents, chairs, bars, linens, napkins, silverware, glassware, china ware, serving utensils, table covers, ice used to chill food or drinks before serving as well as floral arrangements not purchases in accordance with the conditions set forth in subparagraph (v) of this paragraph.
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> * * *
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> *Example 4*: A vendor has contracted to cater an outdoor party at a private residence. The caterer is responsible for making all arrangements for the customer such as providing a tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor, bars, floral arrangements for the tables, a band, serving personnel (who are employees of the caterer), food . . ., alcoholic beverages, soft drinks and valet service. The caterer must pay tax on any rental or purchase of the tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor and bars, as well as any floral arrangements not purchased in accordance with the conditions set forth in subparagraph (v) of this paragraph.
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> * * *
>
> (v) Flowers purchased for resale by caterers. Notwithstanding the contrary provisions of this paragraph, caterers may purchase flowers from a florist for resale under the following conditions:

> (a) The customer must have the option not to purchase any flowers at all. If the customer wants flowers, the customer must have the option of dealing directly with the florist of the customer's choosing or of purchasing them through the caterer. If the customer chooses its own florist or not to have flowers, the caterer's charge is reduced to reflect that it is not providing flowers.
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> (b) The customer of the caterer must have complete control over the selection and arrangement of the flowers.
>
> (c) The customer or guests of the customer must have the right to remove the flowers from the caterer's premises.
>
> (d) The caterer must maintain records identifying specifically the customer, florist and flowers that were purchased for resale.
>
> (e) The caterer may not itself use the customer's flowers. Nor may the caterer use one customer's flowers for another customer.
>
> (f) The caterer must collect the sales tax from the customer on the entire charge, including any charge for flowers.

C. Petitioners have attempted to draw a distinction between the catering equipment that Elegant Affairs uses in the preparation and service of the food and beverages sold at the catered parties, equipment such as portable ovens, glassware racks and various serving pieces (bowls, trays, etc.) and the equipment (hereinafter referred to as "rental equipment") which it contends is rented to its customers for the use of the customers and their guests. This rental equipment includes, among other things, tents, portable dance floors, sound equipment, china, flatware, glassware and linens. Petitioners assert that a primary distinction between catering equipment and rental equipment is the fact that the customers and their guests control the use of the rental equipment. Petitioners, during the course of the hearing, attempted to show that the customer has the right to choose the type or style of the rental equipment (or to choose to obtain its own equipment or use none at all) and to further choose the placement of the rental property such as, for example, where the tent will be erected or where the dance floor shall be placed. In their

brief, petitioners, citing ***Matter of Levine v. State Tax Commn.*** (144 AD2d 209, 534 NYS2d 522), maintain that Elegant Affairs conducts its business "consistent within the framework or tenor of the conduct indicated in the ***Matter of Levine*** case." This case shall hereinafter be discussed.

Petitioners further point to the fact that rentals make up a very significant portion of Elegant Affairs' business and that the company is not casually or occasionally renting or re-renting equipment to its customers. According to petitioners, Elegant Affairs, in effect, operates a catering business with a rental division. At some point in its existence, the shareholders (petitioners Scott Schneider and Andrea Correale) made a corporate decision that they were going into the equipment rental business.

Petitioners, in furtherance of their position, also specify, in detail, on sales invoices from Elegant Affairs to its customers, the exact charges for rental equipment including the number and specific type of rental equipment supplied to the customers.

Finally, petitioners attempt to draw a distinction between an on-premise caterer and an off-premise caterer such as Elegant Affairs by pointing out that the on-premise caterer sells food and beverages to its customers and is not selling or renting to its customers the chairs, tables, etc. which it provides at the business premises.

D. In ***Matter of Levine v. State Tax Commn.*** (***supra***), the issue was whether purchases of floral arrangements by petitioner, a caterer, from a florist were nontaxable as purchases for resale. Petitioner's customer had a choice whether to have flowers at an event. The caterer presented a resale certificate to the florist when purchasing the flowers and then charged sales tax to the customer on its entire bill including the cost of the flowers. The customer could, if he so desired, take the flowers from the premises prior to or after the event. In holding that

petitioner's purchase of flowers from florists were for resale to its customers and, therefore, should have been excluded from sales tax when purchased by petitioner, the court stated:

> The undisputed evidence conclusively establishes that the only service performed by petitioner in regard to flowers was to make the arrangements with the florist and to place the flowers on the tables in their appropriate positions. It was also undisputed that the customer was granted every right of ownership and directed the disposition of the flowers following the reception.

Subparagraph (v) of 20 NYCRR 527.8(f)(1), set forth in Conclusion of Law "B", lists the conditions under which a caterer may purchase flowers for resale. Most notably, the customer or guests of the customer must have the right to remove the flowers from the caterer's premises. This condition complies with the court's decision in ***Matter of Levine*** where the customer had the right of ownership and the right to direct disposition of the flowers. Clearly, both the Appellate Division of the New York State Supreme Court and the Division, in promulgating a regulation dealing just with flowers, recognized the fact that unlike other items purchased by caterers such as china, glassware, tables, etc., flowers are perishable and, with few exceptions, not reusable. Therefore, despite petitioners' assertion that Elegant Affairs is conducting its business consistent with the framework indicated in ***Matter of Levine***, i.e, the rentable equipment is earmarked as rentable catering equipment and is either provided by the customer or rented by or for the customer at the customer's discretion, it cannot be found that this case is on point in the present matter. The Tax Appeals Tribunal, in ***Matter of D-M Restaurant Corp.*** (Tax Appeals Tribunal, April 18, 1991), noted:

> 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 every right of ownership and control of the disposition of the tableware.

E. In ***Matter of Ricky Eisen*** (Tax Appeals Tribunal, July 5, 2001), a case which involved an off-premise caterer which rented tables, chairs and equipment from a third-party vendor and re-rented the items to its customers as part of its food catering service, the Tribunal affirmed the determination of the Administrative Law Judge who held that the initial rental of the items by the caterer was subject to tax as a retail sale. The Tribunal stated that the tables, chairs and other equipment were packaged by the caterer as part of the catering service and, as such, remained within its control at all times.

Petitioners attempt to distinguish the matter at issue from ***Ricky Eisen*** by asserting that, unlike the caterer in ***Ricky Eisen***, a significant portion of Elegant Affairs' business is derived from renting the catering equipment, Elegant Affairs provides detailed and specific invoices as to the number and type of rental equipment provided and Elegant Affairs' customers have the right to furnish the items themselves or rent from another vendor. While Elegant Affairs is not a traditional, on-premise caterer and while it derives a substantial portion of its income from its rentals to customers, these factors do not render its purchases or rentals of the catering equipment sales for resale.

Effective September 1990, the Division's regulations were amended by adding the language set forth in 20 NYCRR 527.8(f)(2) and the examples which follow. While the Division of Tax Appeals has the authority to rule on the validity of regulations promulgated by the Division of Taxation (***see***, Tax Law § 2006[7]), if determined to be reasonable, such regulations have the force and effect of law (***see***, ***Molina v. Games Management Services***, 58 NY2d 523, 462 NYS2d 615). In general, the Division's regulations must be upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assocs. v. Tully***, 79 AD2d 761,

434 NYS2d 788, ***affd*** 54 NY2d 711, 442 NYS2d 978) or erroneous (***Matter of Koner v. Procaccino***, 39 NY2d 258, 383 NYS2d 295).

Subdivision (f) of section 527.8 of the Division's regulations deals specifically with caterers and states that "[t]axable tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to tax." (20 NYCRR 527.8[f][2][i].) Example 4 in 20 NYCRR 527.8(f)(2)(ii) refers to a vendor which has contracted to cater an outdoor party at a private residence which is precisely the business engaged in by Elegant Affairs. This example states that "[t]he caterer must pay tax on any rental or purchase of the tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor and bars . . . ."

The Division's regulations do not distinguish between on-premise and off-premise caterers or between those caterers who are engaged in substantial rather than occasional rentals. As stated by the court in ***Matter of Custom Management Corp. v. New York State Tax Commn.*** (148 AD2d 919, 539 NYS2d 550, 552), "Any resale which is purely incidental to the primary purpose of the business is not a purchase for resale as such." Elegant Affairs is a caterer and, accordingly, is subject to the provisions of 20 NYCRR 527.8(f).

F. As previously noted, one of Elegant Affairs' vendors, P.J. McBride, Inc., provided it with a copy of a State Tax Commission decision, ***Matter of The Food Gallery, Inc.*** (State Tax Commission, June 17, 1986) as the legal authority for this vendor's refusal to accept resale certificates from Elegant Affairs on equipment purchased or rented. This decision stated, in part, "[t]hat 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."

In their reply brief, petitioners point out that in ***Food Gallery***, the amount of equipment rental purchases was minimal; therefore, the rental of catering equipment was incidental to the business of catering. Petitioners contend that the business of Elegant Affairs consists of two divisions, the catering and the equipment rental. However, it is clear that while the renting of the catering equipment is a significant part of Elegant Affairs' business, its primary business is that of an off-premise caterer. Clearly, one cannot circumvent the Tax Law or the regulations promulgated thereunder merely by calling its equipment rental, the "rental division" (***see***, Finding of Fact "19").

Elegant Affairs is an off-premise caterer which also derives substantial revenue from renting catering equipment and other equipment desired by particular customers. It purchases some of this equipment and rents other equipment from third-party vendors. There is no dispute that its operation varies considerably from that of an on-premise caterer which offers little or no choice in glassware, china, tableware, linens, etc. Nevertheless, Elegant Affairs is a caterer and, as such, is subject to the statutes and regulations applicable to caterers. Its purchases and rentals of equipment from third-party vendors are not for resale and the Division properly imposed sales and use tax on all such transactions.

G. Tax Law § 1105(c) imposes sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property.

The term "capital improvement" is defined in Tax Law § 1101(b)(9)(i) as

> An addition or alteration to real property which:
>
> (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

As previously noted, petitioners submitted, along with their reply brief, a copy of a lease agreement for the lease of Elegant Affairs' business premises at 110 Glen Cove Avenue, Glen Cove, New York. However, since petitioners did not request additional time at the conclusion of the hearing to submit this lease, it cannot become part of the record. The Tax Appeals Tribunal has held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final (***see***, ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (***see, Matter of Moore***, Tax Appeals Tribunal, June 28, 2001; ***Matter of Emerson***, Tax Appeals Tribunal, May 10, 2001; ***Matter of Schoonover***, ***supra***).

H. Because Elegant Affairs does not own the building at 100 Glen Cove Avenue, petitioners must overcome the presumption against a finding of permanency for tenant improvements (***see***, ***Matter of Gem Stores, Inc.***, Tax Appeals Tribunal, October 14, 1988). Under this presumption, unless a contrary intention is expressed, installations made by a tenant for the purpose of conducting the business of the tenant on the real property it leases are presumed not to be permanent, but made for the sole use and enjoyment of the owner of the business (***Matter of Empire Vision Center, Inc.***, Tax Appeals Tribunal, November 7, 1991). In light of the foregoing, the contested items (***see***, Findings of Fact "17" and "18") which

petitioners assert should be exempt from sales tax as capital improvements shall be considered separately.

The invoice from American Restaurant Equipment, dated June 2, 1999, in the amount of $5,065.00 was for a walk-in freezer. Despite petitioner Scott Schneider's testimony that a concrete slab was poured upon which the freezer was installed, there is no evidence that the freezer was intended to be a permanent installation or that removal thereof would cause material damage to the property. In addition, there is no evidence that the freezer added to the value of the property other than if a subsequent tenant was in a business similar to that of Elegant Affairs. Clearly, the freezer did not prolong the useful life of the real property. Since it must, therefore, be found that a walk-in freezer failed to meet any of three factors defining a "capital improvement" set forth in Tax Law § 1101(b)(9)(i), the Division properly assessed sales tax thereon.

Petitioners presented a series of invoices from Daltile Corporation all of which were issued in February and March 2001. According to the invoices and the credible testimony of petitioner Scott Schneider, the invoices were for materials necessary for the installation of 3,000 square feet of graded tile and floor drains. Sales tax was properly imposed by Daltile Corporation and was paid by Elegant Affairs. At issue herein are three invoices: February 14, 2001 in the amount of $1,000.00; June 1, 1999 in the amount of $4,000.00; and March 19, 2001 in the amount of $2,000.00 which Mr. Schneider stated were amounts paid to Edward Gomez for the installation of the floor at the business location. Pursuant to the Division's Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, offered into evidence at the hearing by the Division, the installation or complete replacement of floorings is considered to be a capital improvement. While two of the invoices from Mr. Gomez were dated during the

period when the flooring was purchased by Elegant Affairs from Daltile Corporation, the invoice in the amount of $4,000.00, dated June 1, 1999, was nearly two years prior thereto. Accordingly, tax assessed on the June 1, 1999 invoice ($340.00) is sustained. However, tax assessed on the February 14, 2001 invoice ($85.00) and tax assessed on the March 19, 2001 invoice ($170.00), or a total of $255.00, should be canceled.

Petitioners presented an invoice from Home Theater High-Tech Audio, dated May 14, 2001, in the amount of $7,795.00, $6,195.00 of which was for equipment and $1,600.00 of which was for "installation of sound and video." No tax was charged by the vendor and no tax was paid by Elegant Affairs. Appearing on the first line of the invoice was a charge of $1,000.00 for "prewire and labor" which the auditor subtracted as a capital improvement. Sales tax on the balance of the invoice ($6,795.00) was assessed by the auditor in the amount of $577.58. On the last line of the invoice is a charge in the amount of $1,600.00 for installation of sound and video. Petitioner Scott Schneider testified that the invoice was for the installation of a surveillance monitoring system installed to prevent theft as well as for a sound system built into the walls of the premises for tastings and other customer-related uses. Publication 862 lists, as a capital improvement, the in-wall installations of electrical wiring in connection with the installation of a security system. The auditor properly did not assess tax on the $1,000.00 prewire and labor charge. As to the $1,600.00 charge for installation of sound and video, it is unclear as to what portion, if any, of this charge was related to the security system. Clearly, a sound system does not appreciably prolong the useful life of the real property nor is it permanently affixed such that removal would cause material damage to the property. Since the $1,600.00 charge was not broken out so that it could be readily ascertained how much of this charge involved installation

of the security system, the entire charge must be subject to tax. Accordingly, the auditor properly assessed tax on $6,795.00, or additional tax of $577.58.

Petitioners are not entitled to any additional credits with respect to the assessment of tax on a $4,500.00 invoice dated November 21, 2000 from Cement Work since the invoice from Ringside Concrete was dated January 29, 2001, more than two months after the auditor's Listing of Invoices. No satisfactory explanation was provided to explain this discrepancy.

As to the invoice in the amount $5,450.00, dated November 14, 2000, petitioners' contention is that the invoice was for "2 steam kettle and Swiss braiser and sink" which they assert were permanent pieces of kitchen equipment. However, no additional evidence was presented from which it can be determined whether these items meet the definition of capital improvement as set forth in Tax Law § 1101(b)(9)(i). Moreover, since the business premises were rented by Elegant Affairs, the presumption of nonpermanence must be rebutted which it has not been. Therefore, petitioners are not entitled to any adjustment for the tax assessed on this invoice.

I. With respect to petitioners' contention that they are entitled to additional credits (***see***, Finding of Fact "18"), petitioners contend that the auditor assessed tax on a $1,000.00 deposit when sales tax was already paid on the entire invoice. In support of their position, petitioners presented an invoice dated March 17, 1999 from Bar Boy Products in the amount of $5,300.00, plus sales tax of $450.00, for a total due of $5,740.00. The invoice indicates that a deposit in the sum of $1,000.00 was made, thereby leaving a balance due of $4,740.00. Petitioners state that in the auditor's workpapers (Record No. 192), tax was assessed on this $1,000.00 which, if true, would mean that petitioners were being assessed tax twice. However, the auditor's workpapers indicate that Record No.192 was for a Bar Boy Products invoice dated September 21, 2000.

Since this invoice is not part of the record, it cannot be determined whether petitioners were improperly assessed. It appears, however, despite petitioners' contention to the contrary, that they were not assessed tax on the $1,000.00 deposit made on the invoice dated March 17, 1999. Accordingly, no adjustment is warranted based upon the Bar Boy Products invoice.

No adjustment is warranted for the tax assessed on the hot dog truck since no testimony or documentary evidence was presented to substantiate the claim that the hot dog truck was a vehicle upon which tax was paid at the time of its registration.

As to their assertion that they are entitled to a credit for tax paid on eight invoices from A-1 Tablecloth Company for tablecloths purchased by Elegant Affairs and subsequently rented to customers, Conclusions of Law "A" through "F" have addressed petitioners' position and no credit is due thereon.

J. In addition to the taxes assessed, petitioners were also assessed penalties under Tax Law § 1145(a)(1) for failure to properly pay any tax imposed under Articles 28 and 29 of the Tax Law, and for failure to report and pay sales tax in an amount in excess of 25% of the amount required to be shown on the return. Tax Law § 1145(a)(1)(iii) and (vi) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalties and additional interest shall be abated.

On the issue of penalties, petitioners, in their reply brief, assert that because their business model is "somewhat unique," they "believe that for the most part they complied with their understanding of the law." A review of this record does not lead to the same conclusion.

First, there is no dispute that prior to the commencement of this audit, one of Elegant Affairs' vendors, P.J. McBride, Inc., notified Elegant Affairs, in writing dated December 1, 1998, that it would not accept resale certificates on equipment purchased and rented by Elegant

Affairs because the vendor did not consider these purchases and rentals to be for resale. In support of its position, P.J. McBride, Inc. furnished Elegant Affairs with a copy of a State Tax Commission decision, ***Matter of Food Gallery, Inc.*** (***supra***), which discussed a caterer's obligation to pay tax on its purchases and rentals. Rather than comply with that decision or, in the alternative, to request an advisory opinion from the Division, petitioners paid sales tax on its future purchases and rentals from P.J. McBride, Inc., and thereafter took credit on its sales tax returns for the tax paid. In addition, petitioners continued to issue resale certificates to other vendors and, in some cases, when vendors charged tax on their invoices to Elegant Affairs, petitioners would cross out the sales tax and pay only the selling price of the items, excluding the tax.

20 NYCRR 2392.1(g)(2) provides, in relevant part, as follows:

> In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper tax liability. In addition to any relevant grounds for reasonable cause as exemplified in subdivision (d) of this section [none of which are applicable herein], circumstances that indicate reasonable cause and good faith with respect to the substantial underpayment or omission of tax, where clearly established by or on behalf of the taxpayer, may include the following:
>
> > (i) an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer.

As stated herein, petitioners, with knowledge of relevant case law as well as the statutes and regulations applicable to caterers, nevertheless decided that their business operation took them outside the scope of a "caterer." They did not seek to obtain an advisory opinion from the Division but, instead, determined that they would not pay (or if required by a vendor to pay, would take a credit on Elegant Affairs' sales tax returns) sales tax on their purchases and rentals of equipment which they concluded was for resale to their customer. By virtue of taking this

position, it cannot be found that petitioners' failure to pay tax due was due to reasonable cause. Penalties assessed are, therefore, sustained.

K. The petitions of Elegant Affairs, Inc., Andrea Correale and Scott Schneider are granted to the extent indicated in Conclusion of Law "H", the Division is directed to modify the notices of determination accordingly, and except as so granted the petitions are otherwise denied.

DATED: Troy, New York
February 8, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE