STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
21 CLUB, INC.	:	DETERMINATION DTA NO. 820914
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 November 30, 2002.	:	

Petitioner, 21 Club, Inc., 21 West 52nd Street, New York, New York 10019, 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 November 30, 2002.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 20, 2006 at 10:30 A.M., with all briefs to be submitted by March 30, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared by S. Buxbaum and Company CPA's, LLP (Michael Buxbaum, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly assessed sales and use taxes upon the rentals of certain audiovisual equipment by petitioner from third-party vendors which was subsequently provided to its customers.

FINDINGS OF FACT

1. On May 2, 2002, the Division of Taxation ("Division") sent a letter to 21 Club, Inc. ("petitioner") which advised that its sales and use tax records were scheduled for a field audit. Attached to the letter was a list of all records to be made available for audit. The audit period listed on the letter was June 1, 1999 through February 28, 2002. Subsequent letters from the Division to petitioner dated January 15, 2003 and February 10, 2003 amended the audit period to the period at issue in this proceeding, i.e., June 1, 1999 through November 30, 2002.

2. During the audit, a series of consents were executed by petitioner whereby it was agreed that sales and use taxes for the period June 1, 1999 through February 28, 2002 could be assessed at any time on or before March 20, 2005.

3. On March 14, 2003 and later on September 7, 2004, petitioner's controller signed a form AU-377.12, Test Period Audit Method Election, whereby petitioner consented to the use of a test period audit with respect to the audit of petitioner's sales and recurring purchases. The test period utilized was the calendar year 2001.

4. On audit, it was determined that petitioner had additional taxable sales in the amount of $23,860.24 with tax due thereon of $1,968.47.

A review of fixed assets and leasehold improvements resulted in tax being assessed in the amount of $29,397.57. Tax on purchases of computer equipment and supplies from out-of-state vendors totaled $9,927.57 and was agreed and paid by petitioner. Tax of $19,470.00 was assessed on mural painting services performed on walls and was not agreed to by petitioner.

Tax was assessed on recurring expense purchases in the amount of $87,877.70. Tax of $15,824.04 on general office supplies purchased from out-of-state suppliers was agreed and paid

which left a balance of $72,053.66. This amount resulted from petitioner's rental of audiovisual equipment for use by its customers.

Total tax was therefore assessed in the amount of $119,243.74, and the agreed portion was $27,720.08, which consisted of tax due on sales ($1,968.47), tax on office supplies from out-of-state suppliers ($15,824.04) and tax on certain fixed assets and leasehold improvements ($9,927.57), thereby leaving a balance of $91,523.66 in dispute.

5. Accordingly, on January 21, 2005, the Division issued a Notice of Determination to petitioner in the amount of $91,523.66, plus penalty and interest, for a total amount due of $172,520.04 for the period June 1, 1999 through November 30, 2002.

6. By a Conciliation Order (CMS No. 209019) dated December 2, 2005, the Division's Bureau of Conciliation and Mediation Services recomputed the tax due from $119,243.74 to $72,053.66, plus interest computed at the applicable rate. Penalties previously assessed were canceled. The $72,053.66 represents tax assessed on petitioner's rentals of audiovisual equipment for use by its customers during catered lunches, dinners and other events.

7. As previously noted, the Division utilized a test period audit with respect to sales and recurring purchases. The auditor examined invoices from King Cole Audio Visual Services ($103,710.01) and Presentation Services ($145,826.16) for audiovisual equipment for the year 2001. Tax due on these rentals for the year was $20,586.75, or $5,146.69 per quarter. The auditor utilized a straight-line method, i.e., the tax amount for the test period was divided evenly among the sales tax quarters at issue. Accordingly, for the audit period (14 quarters), total tax due was computed to be $72,053.66.

8. Petitioner is a restaurant located at 21 West 52nd Street in New York City. When petitioner catered an event and the customer requested that audiovisual equipment be provided,

petitioner separately stated the charge for the equipment on its invoice to the customer. Petitioner's invoice to its customer included charges for food, beverages, tax and gratuity as well as, where appropriate, the charge for audiovisual equipment and related services. While petitioner charged sales tax on the audiovisual equipment provided to the customer and remitted the tax to the Division, it did not pay sales tax to the vendors of the equipment.

9. During the period at issue, approximately 50 percent of petitioner's customers used audiovisual equipment for their events.

10. On June 13, 2001, petitioner entered into a service agreement for audiovisual services with Presentation Services ("PS") whereby PS became the exclusive provider of audiovisual equipment and related services for petitioner's guests, clients and customers for a period of five years to expire on March 31, 2006. The service agreement provided, among other things, as follows:

a. PS would be the exclusive provider of audiovisual equipment and related services at petitioner's place of business, and petitioner would not operate its own equipment rental or enter into an agreement with any other provider;

b. PS would provide related audiovisual services to petitioner and its guests, customers and clients including the setting up and tearing down of the equipment;

c. Under certain limited circumstances, a third-party supplier of audiovisual equipment and services would be permitted to supply the equipment and services in cases where a particular client required or chose to retain such third-party vendor;

d. PS would staff an office at petitioner's premises with an appropriate and adequate number of staff and technicians to provide the audiovisual services;

e. PS would invoice all amounts due for services through petitioner's master billing system. If requested by petitioner's clients, PS would enter into other reasonable payment and prepayment arrangements with such clients. Petitioner would be responsible for collecting all amounts due to PS included on room or master accounts for the account of PS; and

f. Petitioner would receive commissions based upon the revenues generated by PS's services at petitioner's premises. These commissions were 50% on equipment rentals, 25% on service charges, 50% on subrental equipment charges and 2% on annual equipment rentals.

11. Bryan McGuire, petitioner's chief operating officer, indicated that customers had complete control over the selection of audiovisual equipment and the arrangement of such equipment at the customer's event. The customers also had the option not to use any audiovisual equipment. In cases where a customer had multiple events occurring at or about the same time, the customer had the right to remove the equipment from petitioner's premises and take it to the other location. In those instances, separate arrangements would have to be made by the customer directly with PS and if the equipment was lost or broken, the customer was responsible for the repair or replacement costs.

When a customer chose to use audiovisual equipment, it entered into an agreement with petitioner and not with PS. The customers paid all charges for the equipment and related services to petitioner and petitioner collected the sales tax due thereon. The customer signed no agreement with PS and, therefore, had no direct relationship with the provider of the audiovisual services.

When holding an event at petitioner's premises, a customer had the option of arranging and paying for audiovisual equipment from a vendor of its choice or might, if it wished, bring its own equipment.

12. Petitioner did not rent audiovisual equipment or provide related services without also providing catering services, i.e., it was not in the business of renting or providing audiovisual equipment alone. PS handled the equipment 100% of the time. PS staff set up the equipment, operated it if appropriate, stayed during the event and broke down the equipment at the conclusion of the event. Petitioner's staff did not handle or operate the audiovisual equipment.

13. As indicated in the service agreement with PS, petitioner received a commission, paid annually at the close of each year, from PS. Petitioner did not mark up the audiovisual equipment and related services provided to its customers.

14. At the time at which petitioner entered into an agreement with a customer to provide catering services, it informed the customer that audiovisual equipment, flowers, music, etc., could be provided by petitioner.

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 and a sale for use in performing certain enumerated services (catering service, taxable under Tax Law § 1105[d], is not one of those services) are not considered to be retail sales and are not, therefore, subject to tax. A rental is considered to be a retail sale (Tax Law § 1101[b][5]).

B. In its brief, petitioner cites to a Division regulation, 20 NYCRR 526.6(c)(1), which provides as follows:

> Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Immediately beneath the language of the regulation, however, are cross-references to special applications of resale exclusions, one of which is to section 527.8 of the regulations which pertains to food and drink.

C. 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.

* * *

(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, chinaware, 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.

* * *

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), 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.

* * *

(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 a 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.

(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.

D. In its brief, petitioner states that the transaction at issue in this matter is analogous to the exemption provided for the purchase of flowers by caterers, citing ***Matter of Levine v. State Tax Commn.*** (144 AD2d 209, 534 NYS2d 522). Petitioner's argument is without merit.

In ***Matter of Levine***, the issue was whether purchases of floral arrangements by petitioner, a caterer, from a florist were nontaxable as purchases for resale. 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 flowers. Petitioner's customer had a choice whether to have flowers at an event. The customer could, if he so desired, take the flowers from the premises prior to or after the event. The Court held that the caterer's purchase of flowers from

the florists were for resale to its customers and, therefore, should have been excluded from sales tax when purchased by the caterer.

20 NYCRR 527.8(f)(2)(v), set forth above, lists the conditions under which a caterer may purchase flowers for resale. Of primary importance is the fact that the customer or his guests must have the right to remove the flowers from the caterer's premises and, in addition, the caterer may not itself use the customer's flowers or use one customer's flowers for another customer. Both the Division in promulgating this regulation and the Appellate Division of the New York State Supreme Court in its opinion in ***Matter of Levine*** (***supra***) recognized that flowers, unlike other items purchased by caterers in performing its catering services, are perishable and, in most instances, not reusable. Audiovisual equipment, on the other hand, is not perishable and certainly may be reused.

While petitioner contends that it does not use the audiovisual equipment for self-use and that its customers have complete control over the equipment and have the right to remove the audiovisual equipment from the premises, clearly the customer bears the burden if the equipment is lost or damaged if and when it is removed from petitioner's premises and, therefore, is removed from the supervision of PS's employees. Moreover, it would appear that such equipment is removed from petitioner's premises only on the rarest of occasions, when prior arrangements have been made with PS by the customer. The special nature of flowers and the narrowness of the exemption pertaining to flowers was duly noted by the Tribunal in ***Matter of D-M Restaurant Corp.*** (Tax Appeals Tribunal, April 18, 1991), a case in which the petitioner claimed that its purchases of tableware were for resale, when the Tribunal stated:

> 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. Petitioner also contends that the Division's reliance, in its brief, on ***Matter of Eisen*** (Tax Appeals Tribunal, July 5, 2001) is misplaced. The ***Eisen*** case 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.

While, in the present matter, the control of the audiovisual equipment is, in fact, within the control of PS (as opposed to petitioner) during its use at a function held at petitioner's premises, this distinction results solely by virtue of the service agreement entered into between petitioner and PS wherein PS agreed to provide staff and technicians to provide audiovisual services to petitioner's customers. As previously noted, when the customer chooses to use audiovisual equipment at an event held at petitioner's premises, unless the customer requires or chooses to retain a different vendor, the customer enters into an agreement with petitioner and not with PS. Therefore, as far as the customer is concerned, the audiovisual equipment is controlled by petitioner through the subvendor, PS.

F. 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 AD2d 258, 383 NYS2d 295).

G. In its reply brief, petitioner points to the fact that audiovisual equipment, unlike china, linen, silverware, etc., is not used to provide a catering service. Moreover, it contends that its customers have the option not to purchase audiovisual services from petitioner and, therefore, it is not part of the catering services provided by petitioner.

The applicable regulation 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) 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 . . . ." While linens, silverware, chinaware, napkins and glassware are items normally associated with services provided by a caterer, the other items of tangible personal property are not necessarily associated with catering services. Nevertheless, these items, tents, tables and chairs and portable dance floors, when purchased or rented by a caterer, are subject to tax when used by a caterer in performing catering services.

Petitioner is not in the business of renting audiovisual equipment or providing related services without also providing catering services. Audiovisual equipment is used by this caterer in approximately 50 percent of its catered events. Accordingly, it is hereby determined that the Division's regulation, 20 NYCRR 527.8(f)(2), is not erroneous, irrational or inconsistent with Tax Law § 1105(d) and, as such, the Division properly assessed sales and use taxes upon

petitioner's rentals of audiovisual equipment from PS for use by petitioner's customers at catered events on petitioner's premises.

H. The petition of 21 Club, Inc. is denied, and the Notice of Determination issued on January 21, 2005, as modified in Finding of Fact "6", is hereby sustained.

DATED: Troy, New York
September 20, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE