

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WHITSON’S FOOD SERVICE CORP. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 824629
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2005 through November 30, 2007. :
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Petitioner, Whitson’s Food Service Corp., 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 March 1, 2005 through November 30, 2007.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at Agency Building #1, Empire State Plaza, Albany, New York, on February 20, 2013 at 11:00 A.M., with all briefs to be submitted by August 28, 2013, which date began the six-month period for the issuance of this determination. Petitioner appeared by Buxbaum Sales Tax Consultants, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether petitioner, Whitson’s Food Service Corp., has established that its sales were nontaxable sales for resale.

II. Whether petitioner has established by clear and convincing evidence that it is entitled to a refund for the payment of sales taxes that were collected and remitted by one of its customers.

III. Whether petitioner has established by clear and convincing evidence that it is entitled to a refund for the payment of sales taxes on the bulk sale of coffee.

FINDINGS OF FACT

1. During the period in issue petitioner, Whitson's Food Service Corp. (Whitson's), was a full-service food caterer. It sold prepared meals and provided food management services to institutional and retail clients including public and private companies, healthcare and assisted living institutions and public schools. Whitson's activities included operating the dining and kitchen facilities on its clients' premises.

2. On February 5, 2008, the Division of Taxation (Division) mailed a letter to Whitson's informing the firm that it had been selected for a field audit for the period of March 1, 2005 through November 30, 2007. The letter requested that all books and records be available for audit. A schedule of books and records to be produced was attached to the letter. Following a review of the records provided, the Division concluded that the sales records were adequate to conduct an audit.

3. On December 8, 2009, Beth Munster, as chief executive officer of Whitson's, executed a Test Period Audit Method Election form for a review of sales. Initially, the Division chose to review sales for the quarter ended November 2006. However, since the records were voluminous, the Division confined its review to the month of September 2006. The Division considered this month to be representative of the business activity.¹

4. The Division reviewed nontaxable sales for the test period and allowed all but four invoices, which it concluded were taxable. Two of the invoices found to be taxable were issued

¹ Petitioner did not raise an objection to the test period.

to The Hamlet on Olde Oyster Bay (The Hamlet) and an associated invoice was issued to the Hamlet Homeowners Association. The total sales amount of the three invoices was \$136,259.98. Initially, Whitson's told the Division that The Hamlet was an exempt organization and, in turn, the Division asked to examine an exempt organization certificate. Whitson's asked The Hamlet for such a certificate and it could not be provided. The Hamlet was also unable to provide an exemption certificate for the homeowners association. Since the tax exempt status could not be documented, the Division concluded that these transactions were taxable and that sales tax was due on the sales.

5. The remaining invoice was issued to MSC Industrial Direct Co., Inc., (MSC), in the amount of \$12,108.81. The invoice, which was dated September 26, 2006, listed a charge for coffee service in the amount of \$10,186.47 and a charge for coffee service labor in the amount of \$1,922.34. The Division concluded that sales tax was erroneously omitted from the charge for the coffee service. During the audit, Whitson's advised the Division that coffee service was merely the sale of coffee but no documentation was provided to support this position.

6. Whitson's contract with The Hamlet was only for the period June 2006 through February 2007, whereas its contract with MSC encompassed the entire audit period. In order to account for this difference, the Division calculated two error rates. The error rate of 1.03861 was applied to the period that petitioner serviced both The Hamlet and MSC, and an error rate of 1.00304 was applied to the periods before June 2006 and after February 2007 when Whitson's only served MSC. The error rates were divided into reported nontaxable sales to determine additional taxable sales of \$813,122.15 and additional sales tax due of \$70,166.76. The Division also reviewed Whitson's capital records in detail and found that there were additional taxable purchases of \$358,292.00 resulting in tax due of \$30,927.85.

7. The forgoing audit led the Division to conclude that sales tax was due in the amount of \$102,594.61 as follows:

Area of Audit	Additional Tax
Sales	\$70,166.76
Capital expenditures	\$30,927.85
Recapture of Vendor Collection Credit	\$1,500.00
Total	\$102,594.61

8. The Division did not assess penalties because it received a letter from Whitson's accountant that established, to the satisfaction of the Division, that Whitson's acted with reasonable cause in not collecting sales tax from The Hamlet.

9. On November 5, 2010, the Division issued a Statement of Proposed Audit Change that asserted that sales and use tax was due in the amount of \$102,594.62, plus interest, for a balance due of \$143,501.50. On the same date that the statement was dated, Whitson's signed the consent portion of the statement and agreed to the tax plus interest. Thereafter, Whitson's paid the amount due.

10. On June 13, 2011, Whitson's filed an Application for Credit or Refund of Sales and Use Tax claiming a refund in the amount of \$102,694.62 plus interest.

11. In a letter dated September 15, 2011, the Division explained that Whitson's request was granted to the extent that Division permitted a refund of the vendor collection credit in the amount of \$1,500.00 and a refund of the tax of \$2,075.26 on the labor charge for coffee service listed on an invoice to MSC. The Division permitted the refund of tax on the coffee service labor because petitioner provided the auditor with an invoice to MSC that showed that tax was charged on the coffee service labor portion of the invoice. The amount, in turn, could be traced to

petitioner's sales tax accrual account. The allowance of tax collected on coffee service labor, reduced the error rate which, in turn, reduced the amount of tax due. The Division rejected the remaining claims for a refund on the grounds that the sales to The Hamlet were taxable sales of prepared food, that Whitson's failed to provide documentation to substantiate that the sales of the coffee service portion of the invoices were nontaxable and the amount of the refund claimed was \$100.00 more than the amount of tax asserted to be due.

12. The papers submitted with the refund request included returns from an entity called the Hamlet Restaurant Corporation. However, none of the invoices involved on the audit were issued to the Hamlet Restaurant Corporation. Rather, the audit focused upon The Hamlet on Olde Oyster Bay. In examining the refund claim, the Division observed that both entities had the same ID number on the Division's internal computer systems. On the other hand, the sales tax return of the Hamlet Restaurant Corporation for the quarter ended November 2006 reported that all of its sales were in Suffolk County, whereas the sales reviewed on the audit were in Nassau County. Lastly, the Division observed that whereas the total sales of The Hamlet Restaurant Corporation were approximately \$210,000.00, Whitson's sales to The Hamlet, according to Whitson's records, were more than \$350,000.00. The discrepancies led the Division to conclude that the refund application relied upon sales other than those that were disallowed on the audit. Therefore, the sales to the Hamlet Restaurant Corporation were disregarded.

13. Whitson's managed the food service operations of The Hamlet's clubhouse restaurant, pool grill and convenience store. It also provided catering services on the premises of The Hamlet. The patrons of the restaurant signed for their meals. Whitson's collected the signatures and handed them to the staff of The Hamlet to process with their members directly. Whitson's invoiced The Hamlet for the food and service and the Hamlet, in turn, invoiced its members on a

monthly basis for their charges including sales tax. Thereafter, The Hamlet filed sales tax returns and remitted the tax it collected.

14. In the ordinary course of business, petitioner sold coffee by the pound to MSC in either bags of coffee or k-cups. At the hearing, Whitson's presented a spreadsheet that showed that the \$10,186.47 charge for coffee service included, among other things, a charge for coffee of \$2,253.80, milk of \$507.27, tea and sugar of \$1,391.95, cups, lids, stirrers and napkins of \$933.70 and rental of coffee machines of \$210.14. MSC did not sell the coffee to its employees. Rather, MSC wanted all of its employees to have free coffee regardless of where they were in the building. It was Whitson's practice to check each coffee station located at MSC's premises to ensure that each coffee station was properly stocked with coffee and coffee supplies and clean the areas of the coffee stations. Whitson's also operated a cafeteria and stocked coffee machines. In order to obtain reimbursement for the expenses of operations and the fees due, Whitson's sent monthly invoices to MSC for the cost of the products sold and services provided. The charge for coffee service labor was the labor charge for restocking and maintenance of the coffee stations.

CONCLUSIONS OF LAW

A. At the hearing, Whitson's argued that its sales to The Hamlet and MSC were sales for resale and therefore exempt from tax. Whitson's submits that it knew from the contracts that it entered into with its customers that The Hamlet and MSC were reselling the food to their customers.

B. Initially, it is recognized that although an officer of Whitson's signed a Statement of Proposed Audit Change, petitioner may challenge the results of the audit based on the denial of a refund claim (*Matter of SICA Electrical & Maintenance Corp.*, Tax Appeals Tribunal, February

26, 1998). In order to prevail on such a challenge, petitioner is required to show by clear and convincing evidence that an erroneous amount of tax was asserted to be due (*id.*)

C. In general, sales tax is not imposed on the sales for resale of certain items (Tax Law § 1105 [c]). However, as a caterer, Whitson's was required to collect and remit tax on all of its charges for food (20 NYCRR 527.8[f][1][i]). Accordingly, the sales for resale exclusion does not apply and the argument is found to be without merit.

D. In its brief, Whitson's maintains that by being issued a Statement of Proposed Audit Change for the operation of the restaurant at The Hamlet, the Division seeks to collect sales tax twice on the sale of the restaurant food. Whitson's reasons that the transactions between it and The Hamlet were essentially resale transactions between two caterers involving prepared food. According to Whitson's, the tax was due and owing from the customers of the restaurant. This tax was collected by The Hamlet and remitted to New York State. Thus, Whitson's concludes that when it was assessed for the sale of prepared food to The Hamlet, Whitson's was erroneously assessed the tax liability of The Hamlet without the benefit of a credit that is available to The Hamlet. From this perspective, Whitson's submits that if it had received the credit, the effective liability of The Hamlet would have been zero. According to petitioner, since it stands in the shoes of its customer for any assessment of catered food, its derivative tax liability should also include a credit. Petitioner posits that New York State should not be able to collect tax twice and be unduly enriched on the same transaction.

E. During the audit period, Whitson's conducted business as a caterer and, as such, it was subject to the provisions of 20 NYCRR 527.8(f)(1)(i), which states that: “[a]ll charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable” (emphasis added). Accordingly, by virtue of this

regulation, all of Whitson's charges to The Hamlet were subject to tax and the Division properly imposed sales tax upon the catering services charges to The Hamlet.

F. The Division correctly notes in its brief that Whitson's is seeking a refund of taxes that it neither collected nor paid. In order to address this apparent contradiction, Whitson's relies upon 20 NYCRR 532.3(a)(1), which pertains to personal liability. According to Whitson's, this regulation places it in the shoes of The Hamlet.

Whitson's reliance upon this regulation is misplaced. On its face, this provision pertains to the liability of a responsible officer or employee of a corporation. It has no bearing upon the matter at issue here. In this regard, Whitson's argument that the Division's claim amounts to double taxation does not absolve it from its own tax obligations.

G. Whitson's next argues that it overpaid sales tax after the audit on the sale of nontaxable coffee by the pound. Clearly, there is evidence in the record to support Whitson's claim that it sold bulk ground coffee and other food items to MSC. Further, Whitson's is correct that certain sales of food and food products for human consumption are exempt from sales and use tax (Tax Law § 1115[a][1]). However, when the sales are made by a caterer, the sale of food is not exempt from sales tax (Tax Law § 1105(d)(1); 20 NYCRR 527.8[f][1][i]).

H. In a reply brief, Whitson's reiterates its argument that The Hamlet on Olde Oyster Bay and the Hamlet Restaurant Corporation operated as one entity. This contention does not warrant the relief that petitioner seeks. As set forth above, as a caterer, all of Whitson's sales were subject to tax, and this liability may not be reduced by its customer's practice in collecting and remitting sales tax. Similarly, as a caterer, its sales of coffee were also subject to tax.

I. The petition of Whitson's Food Service Corp. is denied.

DATED: Albany, New York
February 27, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE