

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-08(59)S
Sales Tax
October 10, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080620B

Petitioner, Sensis Corporation (Company), asks whether the New York sales and use tax applies to the costs reimbursed by Company to a contractor (Contractor), who is responsible for managing all aspects of the operations of Company's dining facility, as well as for serving meals daily. The Company subsidizes the operation of the dining facility by paying the costs that exceed the revenue generated from daily sales of meals to the employees. Petitioner asked whether any of the costs paid by Company are exempt from the New York sales and use tax under the qualified empire zone enterprise (QEZE) sales and use tax exemption. We conclude that the costs paid by the Company are subject to sales tax.

The New York sales tax is imposed on the receipts from every sale of food and drink, when it is sold in or by a restaurant...or other establishments...or by caterers". Tax Law §1105(d). When an employer subsidizes a food service contractor, the subsidy is taxed as a receipt from the sale of food and drink, regardless of whether the reimbursement is called a management fee, guarantee of profit, or something else. 20 NYCRR §527.8(k)(3). New York court decisions have held the same. The Court of Appeals has held that payments to a food service business, under contract to operate an in-house restaurant serving employees of the business's client, constituted "sales" that rendered the business liable for sales tax on the reimbursed costs. The court said that "[t]he amounts received from the corporate clients under the reimbursed costs, subsidy and management fee arrangements are sales of food and drink within the intent and meaning of the statute." *Stouffer Management Food Service Inc. v. Tully*, 98 Misc.2d 1128, 415 N.Y.S.2d 559 (1978), aff'd, 69 A.D.2d 1023, 414 N.Y.S.2d 948, appeal denied, 47 N.Y.2d 709, 419 N.Y.S.2d 1025. In light of the regulation and court cases directly on point, any reimbursable expenses paid by Company to Contractor for dining room operations, whether the expenses are for food or for management functions, are deemed receipts from restaurant meals, and, thus are taxable receipts to Contractor for purposes of the New York sales and use tax.

Petitioner asks whether Company would be exempt from the sales tax charged by Contractor to Company on reimbursable amounts if Company is certified as an Empire Zone business under Article 18-B of the General Municipal Law and as a Qualified Empire Zone Enterprise (QEZE) by the Department of Taxation and Finance. Under §1115(z) of the Tax Law, the receipts from the retail sale of tangible personal property described in §1105(a) of the Tax Law and the receipts from the services described in §1105(b) and (c) are exempt from the New York sales and use tax if sold to a QEZE. The meals subsidized by Company are taxed under §1105(d), and therefore are not eligible for the New York QEZE sales tax exemption.

DATED: October 10, 2008

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.