

**ST 00-14**

**Tax Type: Sales Tax**

**Issue: Sales v. Service Issues**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**THE RESTAURANT, INC.,  
Taxpayer**

**No. 99 ST  
IBT No.  
Claim for Credit**

**Robert Rymek  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Mr. Shepard Smith, Special Assistant Attorney General, for the Illinois Department of Revenue; Mr. William E. Bronner for The RESTAURANT, Inc.

**Synopsis:**

This matter comes on for hearing pursuant to the protest and request for hearing filed by The RESTAURANT, Inc. (hereinafter referred to as the “taxpayer”) following the Department’s denial of its Claim for Credit in the amount of \$4,227. The parties have stipulated to the facts. The parties have also agreed that the sole issue is: “Whether ‘set-up and usage fees’ incurred [sic] by ‘Taxpayer’ as part of its in-house catering business are subject to Retailers Occupation Tax.” Stip. at p. 4.

Following the submission of all evidence and a review of the record, it is recommended that the Department’s denial of taxpayer’s claim be affirmed. In support of this recommendation, I make the following findings of fact and conclusions of law:

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the claim for credit filed by this taxpayer and the Department's denial of it. Stip. Ex. Nos. 2, 3.
2. Taxpayer filed Sales and Use Tax Returns (Form ST-1) for the periods 9/96, 10/96, 4/97, 5/97 6/97, 9/97, 10/97, 11/97, 12/97, and 2/98 through 11/98 (hereinafter the "relevant periods"). Stip. pp. 1, 4; Stip. ¶ No. 1; Stip. Ex. No. 1.
3. Taxpayer filed Amended Sales and Use Tax Returns (Form ST-1-X) for the relevant periods on or about 2/01/99. Stip. ¶ No. 3; Stip. Ex. No. 2.
4. The amended returns claimed overpayments in the total amount of \$4,227. Stip. ¶ No. 3.
5. The Department issued a Notice of Tentative Denial of Claim on March 15, 1999. Stip. ¶ No. 4; Stip. Ex. No. 3.
6. Taxpayer filed a Protest and Request for Hearing on April 15, 1999. Stip. ¶ No. 5; Stip. Ex. No. 4.
7. Taxpayer provided food services at the Exchange (hereinafter the "Exchange") during the relevant periods. Stip. ¶ No. 6.
8. Food services the taxpayer provided at the Exchange during the relevant period consisted of: (1) cafeteria food service; and (2) in house "catering." Stip. ¶ No. 7.
9. The Amended Returns are only concerned with "catering." Stip. ¶ No. 8.
10. The Exchange holds meetings at all hours of the day and night, which the Taxpayer caters. Stip. ¶ No. 9.

11. “Catering” includes, in addition to providing food and drink: (1) providing and setting-up buffet tables; (2) providing linens and China; and (3) providing bartenders, where cocktail parties are requested by Exchange members. Stip. ¶ No. 10.
12. Total job charges for each job includes charges not only for food and drink, but also: (1) set-up charges for the tables; (2) linen and china charges; and (3) bartender fees for the cocktail parties mentioned above. Taxpayer uses the terminology “set- up and usage fees” to cover these charges. Stip. ¶ No. 11.
13. Taxpayer bills the Exchange for each job including the “set-up and usage fees” mentioned above. Stip. ¶ No. 12.
14. Stipulated Exhibit 6 is offered as an example of individual job charges and consists of the taxpayer’s job charges for the month of March 1998. Stip. Ex. No. 6.
15. The taxpayer charges set-up and usage fees on over 80% of its transactions. See Stip Ex. No. 6.
16. The taxpayer’s charges for food and beverage exceeded the charges it made for set-up and usage fees. See Stip. Ex. No. 6.
17. Taxpayer did not include the setup and usage fees mentioned above as a deduction, on line 2 of its Returns for the relevant periods. Accordingly, such deductions were not taken into account in arriving at the taxable receipts shown on line 3 of its returns for the relevant periods. Stip. ¶ No. 13.

18. Taxpayer's Amended Returns include set up and usage fees as a deduction on line 2 and incorporate them in arriving at line 3 taxable receipts. The deduction of set up and usage fees on the Amended Returns creates the claimed total overpayments of \$4,227. Stip. ¶ No. 14.

**Conclusions of Law:**

As previously noted, the parties agree that the sole issue is: "Whether the set-up and usage fees incurred [sic] by the taxpayer as part of its in-house catering business are subject to Retailers Occupation Tax." The taxpayer contends that the set-up and usage fees were "billed independently of food and beverage charges" and "unrelated to the food and beverage it served." Taxpayer's Brief at pp. 4-5. The taxpayer further argues that the set-up and usage fees "should not be subject to taxation" because those fees were "neither mandatory, nor incidental to, nor inseparable from, the sale of food and beverage." Taxpayer's Brief at p. 3. The taxpayer notes that the Exchange was charged the same price for food and beverages, regardless of the extra services ordered. Taxpayer's Brief at pp. 4-5; also see generally Stip. Ex. No. 6.

The Department responds that the taxpayer's amended returns improperly deduct the set-up and usage fees as non-taxable sales of service. Department Brief at p. 4; App. Ex. No. 2. The Department notes that deductions are privileges created by statute as a matter of legislative grace and that they are to be strictly construed in favor of taxation. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295 (1<sup>st</sup> Dist. 1981). The Department argues that the taxpayer's set-up and usage fees are not deductible because Section 1 of the Retailers' Occupation Tax Act states that the selling price or amount of sale "shall be determined without any deduction on account of the cost of the property

sold, *the cost of the materials used, labor or service cost or any other expense whatsoever[.]*” 35 ILCS 120/1 (emphasis added).

The issue involved in this case is one of characterization and arises primarily out of two cases, Miller v. Department of Revenue, 15 Ill. 2d 323 (1958) and Gapers, Inc. v. Department of Revenue, 13 Ill. App. 3d 199 (1<sup>st</sup> Dist. 1973). In Miller the court held that where the owner of a nightclub did not separate the food/drink charges from the entertainment charges for customers, the owner could not deduct the cost of the entertainment from his gross receipts. *Id.* In so doing the court noted that:

“If the thing sold is personal, professional or other service, and not tangible property, receipts therefrom cannot be included in measuring the tax. It is not disputed that if plaintiffs made a separate charge for entertainment, to be paid regardless of whether the customer ordered refreshments, the receipts therefrom cannot be included in measuring the tax.” *Id.* at 325.

Subsequent to Miller, in Gapers, it was held that merely because charges for services are separately stated does not mean that they automatically become deductible. In Gapers, the issue was whether a caterer should be allowed to deduct from its gross receipts, charges for transporting food and equipment to and from a customer’s home. The court held that even though the transportation charges were separately contracted for,<sup>1</sup> they were not deductible because they fell into the category of “any other expense

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<sup>1</sup> The taxpayer claims that in the case at hand is distinguishable from Gapers because here the set-up and usage fees were “segregated”, and that in Gapers, the transportation charges were not “segregated.” Taxpayer’s Brief at p. 5. It is unclear whether the taxpayer is using segregated to mean “separately stated for the customer” or “completely separate and unrelated to the provision food and beverages.”

If the taxpayer means the former it appears that such a distinction is inaccurate because in Gapers, the transportation charges were in fact segregated. See Gapers at p. 200 (“Examination of the many invoices shows that the factual basis for this finding. There are charges made for provisions and other items; and, as

whatsoever” which are not deductible under the express provisions of Section 1 of the Retailers’ Occupation Tax Act. *Id.* at 202; 35 ILCS 120/1. In so holding, the court noted that the caterer agreed that the food and equipment would be provided at the home of the customer and that the transportation was an “inseparable link in the chain of events leading to the completion of the sale of meals to purchasers and not merely incidental to the purpose of the taxpayer’s business of catering private parties in customer’s homes.” *Id.* at 203.

While neither Gapers nor Miller is precisely on point with respect to the facts in the case at hand, both are instructive. Clearly, had the taxpayer in the case at hand not stated its food/beverage charges separately from its set-up and usage charges, the set-up and usage charges would not be deductible under Miller. However, because the taxpayer did separately state the charges, the taxpayer contends that the charges are deductible because “the thing sold is personal, professional or other service, and not tangible property.” Miller at 325.

The Department responds that even though taxpayer separately stated the set-up and usage fees for its customers, such charges remain taxable because they were an “inseparable link in the chain of events leading to the completion of the sale of meals to purchasers and not merely incidental to the purpose of the taxpayer’s business of catering private parties in customer’s homes.” Gapers at 203. Thus, the issue becomes one of characterization: are the set-up and usage fees optional<sup>2</sup> “personal, professional or other

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a general matter, the tax is computed only on these amounts and not on the trucking charges which are separately shown.”).

If the taxpayer means the latter, I find that the record does not support such a conclusion for reasons set forth *infra* at pp. 6-7.

<sup>2</sup> It is undisputed that had the set-up and usage fees would be taxable if they had been a mandatory charge included in all the taxpayer’s transactions. See Fontana D’Or, Inc. v. Department of Revenue, 44 Ill. App. 3d 1064 (1<sup>st</sup> Dist. 1976).

service” fees set forth as deductible in Miller; or are such charges are a “link in the chain of events leading to the sale of meals to purchasers” which would render them non-deductible under Gapers.

After a careful review of the facts of this case, I conclude that the taxpayer’s set-up and usage fees are a link in the chain of events leading to the sale of meals to purchasers and an inseparable part of the taxpayer’s catering business. In this regard, I note that the taxpayer is in a position not unlike that of a restaurant that has both a “dine-in” and a “carry-out” business. The restaurant’s primary business is the sale of food and beverages. It may not deduct the set-up and usage costs attendant to its dine-in business even if it were to separately state those costs to its customers.

Likewise, the taxpayer’s primary business is selling food and beverages. See generally Stip. Exhibits 1, 2, 6. Though the taxpayer may at times provide more extensive levels of service, it, like a restaurant, may not deduct those expenses even if it separately states those costs to its customers.

The facts of this case are clear. The taxpayer charges set-up and usage fees on over 80% of its transactions (see Stip Ex. No. 6) and these fees stem from services which are a part of the taxpayer’s business of catering. Stip. No. 11. Moreover, of the more than 200 catering transactions detailed in Stipulated Exhibit No. 6, in every transaction but one,<sup>3</sup> the charges for food and beverage exceeded the charges for set-up and usage fees. See Stip. Ex. No. 6.

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<sup>3</sup> Moreover, it is questionable whether even that single transaction really involved primarily the provision of services. See Stip. Ex. No. 6. p. 172. That transaction occurred on March 31, 1998 and was a \$6.00 charge for linen and china service for two. *Id.* However, it appears likely that the \$6.00 charge was associated with the provision of food and beverages in a separately listed transaction occurring at the same location at approximately the same time which consisting of a \$313.25 charge for food and beverages and a \$3.00 charge for linen and china. See Stip. Ex. No. 6. p. 170.

The fact that taxpayer's set-up and usage fees are rarely, if ever, charged without there also being a greater charge food or beverage charges, reveals that the set-up and usage fees were simply attendant to the provision of food and beverages. Merely because food and beverages were occasionally purchased without the provision of these attendant set-up and usage services does not mean that in transactions where such services were provided that the services were separate and distinct from the provision of food and beverages. Rather, it merely indicates that in order to effectuate its primary goal of selling food and beverages, the applicants provision of food and beverages would usually be accompanied by the provision of certain incidental services.

In sum, Taxpayer is in business of selling catering services as a whole. The majority of its business is the provision of food and beverage. In providing such consumables, the Taxpayer would offer different levels of service based upon the needs of its customer. Because the vast majority of the applicant's transactions involved the provision of such services, and because there was no evidence that the taxpayer regularly provided these services without also providing food or beverage, such services must be considered a "link in the chain of events leading to the completion of the sale of meals to purchasers" and thus, a nondeductible expense.

For the reasons set forth above, it is my recommendation that the Taxpayer's claim for credit be denied.

March 22, 2000

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Robert Rymek  
Administrative Law Judge