

**IN THE MATTER OF THE PETITION OF ABC, LLC
FOR A DECLARATORY RULING
Document # 8373**

Pursuant to RSA 541-A:1, V; 541-A:9, I(f) and Rev 209.01 et seq., ABC, petitioned the Department of Revenue Administration with respect to the applicability of the New Hampshire Meals and Rooms Tax to the products sold by its business.

DETERMINATION REQUESTED BY THE PETITIONER

ABC operates a franchise and is in the business of preparing and selling food products. ABC has requested a determination that its business is not subject to the Meals and Rooms Tax.

FACTS PRESENTED BY THE PETITIONERS

The petitioners made the following representations of relevant facts:

ABC is a franchise that produces and sells food products. One pre-designed product includes a large jar of sauce. Sauce and Mylar balloons can be included upon the customer's request. A significant part of the cost is in the labor of preparing the food product for display and creating the decorative display.

The bulk of ABC business is via delivery. It operates a storefront where products are produced and from which they are delivered. Customers can contact ABC via telephone, internet or at the storefront to order delivery. ABCs' facility does not include any tables, chairs or other place at which a customer could eat. It also does not provide napkins, plates or eating utensils.

REVISED STATUTES ANNOTATED [RSA] AT ISSUE

1. RSA 78-A:3, X(a);
2. RSA 78-A:3, X(b);
3. RSA 78-A:3, X(c);
4. RSA 78-A:6, II; and,
5. RSA 78-A:6, III.

RULES AT ISSUE

1. N.H. Code Admin. Rev 701.03;
2. N.H. Code Admin. Rev 701.04; and,
3. N.H. Code Admin. Rev 701.13.

PETITIONER'S REPRESENTATIONS

To the best of petitioner's knowledge, the issues that are the subject of this petition:

1. 1) Are not under examination by the department;

2. 2) Have not been examined by the department;
3. 3) Are not under consideration by the department in connection with a return of a prior period; and
4. 4) Are not pending in litigation.

FINDINGS

RSA 78-A, imposes a tax upon meals that are served by a restaurant for which a charge is made. In order for ABC to be subject to the tax it must first be determined if it sells meals as defined by RSA 78-A. RSA 78-A: 3, X(a) defines a meal as follows:

"Meal" means any food or beverage, or both, prepared for human consumption and served by a restaurant, whether the food or beverage is served for consumption on or off the restaurant premises. The term "meal" includes food or beverages sold on a "take out" or "to go" basis, whether or not they are packaged or wrapped and whether or not they are taken from the premises of the restaurant. The term "meal" excludes any food or beverage wholly packaged off the premises except: (1) sandwiches of all kinds; (2) beverages in unsealed containers; and (3) catered meals or meals which are delivered to the location where the meal is consumed. Beverage includes an alcoholic beverage, served with or without food.

According to this definition, in order for sales by the Petitioner to be taxable, the food must be served for human consumption and it must be prepared by a restaurant. With respect to the issue of whether the products are prepared for human consumption, it is clear that the contents are prepared for human consumption. The very aspect of the product that distinguishes them is that the product can be consumed.

The DRA has also promulgated a rule relating to the definition of a meal. Rev Rule 701.13 defines a meal as follows:

"Meal", as defined under RSA 78-A: 3, X(a):

(a) Includes any food or food products, such as but not limited to:

1. (1) Sandwiches of any kind whether prepared or packaged on or off the premises;
2. (2) Beverages in unsealed containers including any alcoholic, malt, or vinous beverage;
3. (3) Salads from salad bars;
4. (4) Heated foods including meats, soups, stews or chowders;
5. (5) Party platters such as vegetable, meat, dessert, bakery, fruit, hors d'oeuvres; or
6. (6) Prepared, ready to eat products whether or not such products have been warmed or cooled to a preferred temperature.
7. The rule specifically includes party platters as a meal in section Rev. 701.13 (5). The products are types of food that are creatively displayed. They are designed to be sold for special events and parties and to be consumed at such events. Therefore, the products sold by the Petitioners fit the definition of a meal.

Secondly, in order for ABC to be subject to the tax it must be determined if it is a restaurant as defined by RSA 78-A. RSA 78-A: 3, X(b) defines a restaurant as follows:

(b) "Restaurant" means an eating establishment where food, food products, or beverages including alcoholic beverages are served and for which a charge is made. The term includes, but is not limited to, a cafe, lunch counter, private or social clubs, cocktail lounges, hotel dining rooms, catering business, tavern, diner, snack bar, dining room, food vending machine, and any other eating place or establishment where meals are served, even if the serving of a meal is not the primary function of the establishment such as but not limited to convenience stores, gas stations, or supermarkets, but only as to the portion of such establishment that serves a "meal" as defined in this chapter. The term includes eating establishments whether stationary or mobile, temporary or permanent.

The definition of "Restaurant" specifically includes catering businesses. The DRA has defined "Caterer" to mean "a person or persons engaged in providing a catered meal or meals including, but not limited to, a personal chef." N.H. Code Admin. Rule Rev 701.03. The DRA has also defined "catered meal" to mean "a meal prepared or served by a person or persons engaged, as part of the regular course of business, in providing meals at various locations, including but not limited to special events, banquets, receptions...and private homes." N.H. Code Admin. Rule Rev 701.04. The rule also provides that the meal may either be prepared or served by the caterer. In this case, the Petitioner prepares the meals and they are served by the customer. Because the Petitioner prepares the meals and delivers meals to its customers for special occasions in the regular course of business, the Petitioner fits the definition of a caterer.

RULINGS

Based on the facts as represented by the petitioner and the statutory and administrative rule provisions discussed above, the department rules that the Petitioner serves taxable meals and is a caterer, and therefore, is required to collect and remit meals and rooms tax on the sale of its products. This ruling is specific to ABC as it described its business in the petition. Application of this ruling to any other situation is not binding on the Department.

6-15-05

G. Philip Blatsos, Commissioner of Revenue