

IMPERIAL CATERING, INC. §
600 20TH AVENUE S. §
BIRMINGHAM, AL 35205-6418, §

Taxpayer, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 12-1279

FINAL ORDER

The Department of Revenue assessed Imperial Catering, Inc. (“Taxpayer”) for State and local sales tax for April 2009 through February 2012. The Taxpayer appealed to the Revenue Department’s Administrative Law Division, now the Tax Tribunal, pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on July 23, 2013.¹ Sam McCord represented the Taxpayer. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer operated a successful catering business in Birmingham, Alabama, during the period in issue. The Revenue Department audited the Taxpayer and assessed it for sales tax on its food and drink delivery charges and its food and drink service charges. The Taxpayer concedes that sales tax is due on the delivery charges. The only disputed issue is whether sales tax is also due on the service charges.

The Taxpayer sometimes prepared and delivered food and drinks to a customer during the period in issue, but was not involved in serving the food and drinks. Those transactions are not in issue.

¹ The Taxpayer provided additional records for the Department’s review after the July 23 hearing. The Taxpayer and the Department did not file briefs in the case until March and May 2015, respectively.

The Taxpayer also sometimes prepared the food and drinks, and also provided food servers and/or bartenders to set up and serve the food and drinks. In those instances, the Taxpayer arranged for the needed number of servers/bartenders to be at the event being catered. The Taxpayer thereafter separately billed the customer a service charge for the servers/bartenders. The Taxpayer's owner testified that the Taxpayer paid the service charge in full directly to the servers/bartenders. On the advice of its accountant, the Taxpayer also issued the servers/bartenders 1099s for the amounts they received.

The Taxpayer argues that it was merely a conduit by which its customers paid the servers/bartenders for their labor performed on behalf of the customers. The Taxpayer's brief at 2, reads in part:

Many times the customers simply ask if Imperial Catering, Inc. will call and arrange for servers etc, on their behalf and simply give them a cost therefore which they agree to pay to (Taxpayer's owner) to distribute to the servers, etc. Imperial Catering, Inc. is merely a go between to provide an extra service for the customers which is stated separately on the invoices, which amount is paid to Imperial Catering, Inc. and Imperial Catering, Inc. simply passes it on to the servers or person who worked said event.

* * *

There is no benefit to Imperial Catering, Inc. under these circumstances. This is a situation where Imperial Catering, Inc. is performing a service at no cost, to the customer to simply provide those who perform services directly to the customer.

* * *

Ultimately, Imperial Catering, Inc. is simply a conduit from its customers to individuals, not employed by Imperial Catering, Inc. who actually perform a service for their customers and not Imperial Catering, Inc. and as such, no sales tax should be charged on said amounts received.

The Department contends that the Taxpayer used the service charges to pay the independent contractor servers/bartenders that the Taxpayer arranged to work the catered

events. It argues that the charges represented the Taxpayer's cost for serving the food and drinks, and thus constituted a part of taxable gross proceeds, citing Department Reg. 810-6-1.34. That regulation specifies that a caterer's gross proceeds are subject to sales tax "without any deduction because of the cost of . . . serving food"

The Department's brief at 4, reads in part:

In the present case, it is undisputed that the full amount of the service charges in issue were used by the Taxpayer to compensate its independent contractors to serve food or drinks it prepared or to set-up for the service of such food. The Taxpayer does not contend nor do the records provided by the Taxpayer during the audit reflect that the charges were in the nature of a gratuity. Accordingly, the proceeds of the service charges in issue were used solely to pay for labor provided by the Taxpayer's independent contractors. It is irrelevant that the Taxpayer's customers asked the Taxpayer to locate servers and bartenders to work the event, that the customer's often asked for specific servers and bartenders, and that the servers and bartenders had jobs outside of working events catered by the Taxpayer. It is undisputed that the service charges were for independent contractors of the Taxpayer, and were used to compensate such persons for working events catered by the Taxpayer as bartenders or servers. The obligation to pay such persons for serving food or drink at events catered by the Taxpayer was the Taxpayer. It is undisputed the independent contractors providing service labor at the events catered by the Taxpayer were contacted by the Taxpayer and paid by the Taxpayer. The Department asserts that the Taxpayer is not merely facilitating payment between the customer and the server or bartender in this instance. As such, the Taxpayer benefitted from the collection of these charges and is therefore liable for sales tax on those proceeds.

The Department has the better argument. The Taxpayer in substance contracted with the servers/bartenders to work the catered events. The Taxpayer presumably told the servers/bartenders the amount they would earn, and was liable to pay the servers/bartenders that amount, even if the Taxpayer's customers subsequently failed to pay the Taxpayer the invoiced service charge amount for the catered event.

In *State v. International Trade Club, Inc.*, 351 So.2d 895 (Ala. Civ. App. 1977), the Alabama Court of Civil Appeals addressed the issue of whether a 15 percent service charge billed by a restaurant to its customers was subject to sales tax. The Court held that “[t]he determinative question (is) . . . whether or not the (taxpayer) receives a benefit from the . . . charge.” *International Trade*, 361 So.2d at 897. The Court accordingly held that if the restaurant used the charge to pay an employee’s guaranteed salary, it benefitted from the charge, and sales tax was due. The amount of the charge that went to an employee over and above the employee’s guaranteed salary was in the nature of a gratuity or tip, and thus not taxable.

As discussed, the service charges in issue were used to pay the servers/bartenders the agreed upon amounts the Taxpayer was obligated to pay those independent contractors.² The charges thus benefitted the Taxpayer, and are taxable.

The charges also were not in the nature of a tip or gratuity. The servers/bartenders agreed to work for a specific amount that the Taxpayer was obligated to pay. The servers/bartenders may have otherwise received tips from the guests at the catered events because when asked if the servers/bartenders set up a tip jar, the owner replied – “That’s their thing. I don’t even fool with that stuff. I don’t sate them. I don’t want to know. That’s not my business.” (T. 13). Any tips or gratuities received by the servers/bartenders were thus separate and apart from the service charge the Taxpayer used to compensate the servers/bartenders.

² As independent contractors, the Taxpayer’s accountant properly advised the Taxpayer that 1099’s should be issued to the servers/bartenders.

I sympathize with the Taxpayer's owner because she believed in good faith that the service charges were not subject to sales tax. The Department presumably also recognized that fact because no penalties were assessed. Unfortunately for the owner, the tax and interest as assessed is due, and must be affirmed.³

Judgment is entered against the Taxpayer for State and local tax and interest of \$17,832.04 and \$549.41, respectively. Additional interest is also due from the date the final assessments were entered, October 4, 2012.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-1(m).

Entered May 21, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Christy O. Edwards, Esq.
Samuel R. McCord, Esq.

³ See also, *Gourmet Pantry, Inc. v. State of Alabama*, Docket S. 13-295 (Admin. Law Div. 7/16/2013).