

Date Issued: June 16, 2015
Georgia Letter Ruling: LR SUT-2015-08
Topic: Food

This letter is in response to your letter ruling request regarding the application of Georgia sales and use tax to certain charges made by Taxpayer.

Facts as Presented by Taxpayer

Taxpayer is an online marketplace for personal chefs and caterers (“Chefs”). Taxpayer hires Chefs to provide meals and related services (“Meals”) to clients at their homes or other venues. Taxpayer provides payment processing, website hosting, marketing, and related services for the Chefs. Chefs are compensated based on the price of the Meals, and Taxpayer collects a service fee on all scheduled Meals. Taxpayer does not hold a food sales license with the Georgia Department of Agriculture or a food service permit with any county board of health or the Georgia Department of Public Health.

A typical transaction is as follows:

1. The client signs up for a free account on Taxpayer’s website.
2. The client selects a date, type of cuisine, Chef(s), and Meal(s).
3. Once the Chef(s) accepts the requested Meal(s), the client is directed to a payment screen on Taxpayer’s website with an invoice for the Meal(s), and the client submits payment to Taxpayer.
4. Taxpayer receives the client’s payment, collects the service fee, and transmits the remaining funds to the appropriate Chef(s).
5. The Chef(s) purchases the food ingredients and other items and prepares the requested Meal for the client on the date and at the location specified by the client.

Taxpayer’s website features a food menu for each Chef that details the Meal offerings, including each Meal’s title, description, and price. All client payments are made to Taxpayer; no payments are made directly to the Chefs, other than optional gratuity. Taxpayer also receives and responds to client questions, special requests, and disputes. The Chefs are independent contractors with their own general liability insurance and control over their hours. The Chefs determine the price of the Meals based on their costs and have all the tools and equipment necessary to prepare the Meals. Even though the client pays an invoice on Taxpayer’s website for “Meals”, Taxpayer takes the position that it is not engaged in the retail sale of meals but is providing a nontaxable service only.

Issue

In the situation presented, are the separately itemized charges for Meals subject to tax?

Analysis

Georgia levies and imposes a tax (subject to certain exemptions) on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on certain enumerated services.¹ “Retail sale” means a sale of tangible personal property or taxable service to any person other than for resale.² “Sale” means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner, or by any means of any kind of tangible personal property for a consideration.³ Retail sales of food and food ingredients by restaurants, hotels, clubs, cafes, caterers, boarding houses, and others are taxable.⁴

Every person making a sale of tangible personal property at retail in this state shall be a dealer and shall be liable for a tax on the sale at the rate of 4 percent of the sale price.⁵ The dealer must collect the tax from the purchaser or

¹ O.C.G.A. §§ 48-3-1 and 48-8-30.

² O.C.G.A. § 48-8-2(6)(A).

³ O.C.G.A. § 48-8-2(33)(A).

⁴ Ga. Comp. R. & Regs. r. 560-12-2-.65.

⁵ O.C.G.A. § 48-8-30(b)(1).

consumer and pay the tax over to the Department.⁶ The dealer shall add the tax to the sale price or charge.⁷ Any dealer who neglects, fails, or refuses to collect the tax upon a retail sale of tangible personal property made by him shall be liable for and shall pay the tax himself.⁸ “Dealer” is defined to include anyone who:

“(G) Sells at retail, offers for sale at retail, or has in his possession for sale at retail, or for use, consumption, distribution, or storage for use or consumption in this state tangible personal property;

(H) Solicits business by an agent, employee, representative, or any other person;

(I) Engages in the regular or systematic solicitation of a consumer market in this state, unless the dealer's only activity in this state is:

(i) Advertising or solicitation by:

(I) Direct mail, catalogs, periodicals, or advertising fliers;

(II) Means of print, radio, or television media; or

(III) Telephone, computer, the Internet, cable, microwave, or other communication system

...”⁹

Entities selling food are typically subject to certain permitting and/or licensing requirements. Georgia law requires that, before beginning operations, a food sales establishment must obtain a license with the Georgia Department of Agriculture, and a food service establishment must obtain a permit from the county board of health or the Georgia Department of Public Health.¹⁰ The term “food sales establishment” means

“retail and wholesale grocery stores; retail seafood stores and places of business; food processing plants, except those food processing plants which are currently required to obtain a license from the Commissioner under any other provision of law; bakeries; confectionaries; fruit, nut, and vegetable stores or roadside stands; wholesale sandwich and salad manufacturers . . . and places of business and similar establishments, mobile or permanent, engaged in the sale of food primarily for consumption off the premises.”¹¹

The term “food service establishment” means

“establishments for the preparation and serving of meals . . . or other edible products either for carry out or service within the establishment . . . [including] restaurants; coffee shops; cafeterias; short order cafes; luncheonettes; taverns; lunchrooms; places which retail sandwiches or salads; soda fountains; institutions, both public and private; food carts; itinerant restaurants; industrial cafeterias; catering establishments; and similar facilities by whatever name called.”¹²

⁶ O.C.G.A. § 48-8-33.

⁷ O.C.G.A. § 48-8-35.

⁸ *Id.*

⁹ O.C.G.A. § 48-8-2(3).

¹⁰ It shall be unlawful for any person to operate a food sales establishment without having first obtained a license from the Commissioner [of Agriculture]. O.C.G.A. § 26-2-25(a). It shall be unlawful for any person to operate a food service establishment without having first obtained a valid food service establishment permit. Such permits shall be issued by the county board of health or its duly authorized representative, subject to supervision and direction by the Department of Public Health; but, where the county board of health is not functioning, such permit shall be issued by the Department of Public Health. O.C.G.A. § 26-2-371.

¹¹ O.C.G.A. § 26-2-21(a)(5).

¹² O.C.G.A. § 26-2-370.

Even if Taxpayer is neither a food sales establishment nor a food service establishment and is not required to obtain a license or permit, the Department considers Taxpayer to be a dealer engaged in the retail sale of meals. Taxpayer qualifies as a dealer by offering tangible personal property (Meals) for sale at retail and by soliciting business from consumers in Georgia. Taxpayer simply contracts with Chefs to prepare the Meals that customers purchase from Taxpayer. Although the Chefs determine the price of the Meals, Taxpayer advertises and offers the Meals and their corresponding prices via Taxpayer's online menus, and coordinates the sale of the Meals, including scheduling, billing, and collecting payment. Customers pay Taxpayer directly for the Meals at the time their request is confirmed and do not pay any additional amounts upon receiving the Meals, except an optional gratuity to the Chefs.

Taxpayer's transactions are virtually the same as a restaurant or catering business in that the customer is purchasing a prepared meal. Although in Taxpayer's case the meal is prepared and served at the customer's home or other venue, Taxpayer is ultimately offering and providing a prepared meal to the customer in the same manner as a restaurant or caterer. In each case (restaurant, caterer, Taxpayer), (i) the customer is offered various food items for purchase; (ii) the customer selects the food they want; (iii) a third party acquires or has already acquired the appropriate ingredients and then prepares and serves the food to the customer; and (iv) the third party cleans up after the customer is finished. Whether the actual preparation of the meal and clean up after the meal are performed by an employee or independent contractor in each case (restaurant, caterer, Taxpayer), all of the activities involved in the sale of a prepared meal must be performed in order to provide the end product and to complete the transaction. The performance of these various activities does not make the overall transaction a service transaction.

Ruling

The actions by Taxpayer amount to making sales of tangible personal property. Thus, Taxpayer's itemized charges for Meals are subject to the tax. Taxpayer is responsible for collecting and remitting Georgia sales tax on the sale price of the Meals without deductions for its service fees.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. Should the circumstances regarding the transactions change or differ materially from those represented, this ruling may become invalid. In addition, subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different tax treatment than that expressed in this ruling.