

M e m o r a n d u m**550.0828**

To: Mr. Bruce A. Belshaw
Oakland - Auditing

October 23, 1990

From: David H. Levine
Senior Tax Counsel

Subject: W--- H. & S--- D. P---
SR --- XX-XXXXXX

This is in response to your memorandum dated September 20, 1990 regarding application of sales tax to a business that serves food and drink aboard boats operating on the San Francisco Bay.

Less than 5% of taxpayer's gross receipts are derived from boat charters where no food or drink is provided. With respect to its other gross receipts, taxpayer enters into two types of contracts. One type provides for charges quoted on a per-guest basis, such as \$49.00 per guest, which includes tax and tip. The other type of contract separately states charges for the yacht and crew, food, drink, music, and tax and tip. You note that the yacht and crew charge appears to include a charge for food and beverage servers. You state:

“We see this operation as being essentially a floating restaurant and consider gross receipts (except for the minor bare boat charters) to be the proper measure of tax. Customers are not interested in the transportation aspects of the cruise as passengers disembark at the place of original boarding. Customers are paying for the atmosphere created by the surroundings, similar to a customer's willingness to pay for a high priced meal at an exclusive restaurant.”

You note that your interpretation appeared to be in conflict with CLD 466 and you ask our opinion. By telephone, Mr. R--- M--- asked us to also provide our opinion with respect to an additional charge for optional live music.

In my letter that formed the basis of CLD 466, I analyzed transportation charges in this context as follows:

“Your charge for transportation by bus charter of persons from one place to a different place is not subject to sales tax, even if a meal is served during the transportation. The reason for this conclusion is that we would regard the bus charter as having been arranged for purposes of transportation and not for purposes of providing facilities for serving food. A closer question is your charge for a yacht charter when the yacht has facilities for a dining room or equivalent and a sit-down meal is provided. Under such circumstances it is very likely that the providing of the taxable meal service is a significant aspect of that yacht charter. However, since a yacht charter provides significant benefits to the participants that are unrelated to taxable sales of food, we will regard such charges for yacht charters as not subject to tax and such charges may be deducted on line 10 of your return. We note that we would reach the opposite conclusion if the yacht remained moored and was not used for transportation.”

This is a tough area and your argument is persuasive. However, for the reasons expressed in the paragraph quoted above, we believe that we must recognize that a significant purpose for a person entering such a charter involving the purchase of taxable food is to obtain the benefits of the yacht charter. That the point of departure and the point of return are the same does not affect the analysis since tours around the bay are just as much transportation as a ferry across the bay. We conclude that charges attributable to the yacht charters are not includable in taxpayer's taxable gross receipts.

We recognize that this conclusion will make for a more difficult audit. You, of course, are not bound by taxpayer's proration. For example, although not clear from the exhibits attached to your memorandum, you imply that taxpayer is not reporting taxes on its charges for the crew, which appears to include a charge for food and beverage service. Amounts attributable to the service of food are clearly subject to sales tax. The amount deductible as for transportation should be no more than the amount charged for a similar charter that does not involve the taxable sale of tangible personal property. It should also be no less than the amount charged for extra cruise time (the invoice attached as Exhibit 1 quotes extra cruise time at \$175 per half hour) assuming this charge relates to the marginal cost for providing that extra cruise time.

With respect to the question regarding charges for optional live music, we believe that such charges are not part of taxpayer's taxable gross receipts.

If you have further questions, feel free to write again.

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