FLORIDA
DEPARTMENT OF REVENUE

Executive
Director
Marshall Stranburg

QUESTION: WHETHER DELIVERY CHARGES AND PROCESSING FEES ARE PART OF THE SALES PRICE OF MEALS SOLD AND DELIVERED TO CUSTOMERS AND ARE TAXABLE.

ANSWER: WHERE CUSTOMERS DO NOT HAVE AN OPTION TO PICK UP THE MEAL FROM THE RESTAURANT, SINCE THE DELIVERY CHARGES CANNOT BE AVOIDED BY DECISION OR ACTION ON THE PART OF THE CUSTOMER, THE CHARGES ARE PART OF THE SALES PRICE OF THE MEAL AND ARE TAXABLE.

WHERE CUSTOMERS HAVE AN OPTION TO PICK UP THE MEALS IN LIEU OF PAYING THE DELIVERY FEE, AND THE FEE IS SEPARATELY STATED ON THE INVOICE, THE CHARGE IS NOT PART OF THE SALES PRICE OF THE MEAL AND IS NOT TAXABLE. IN ALL INSTANCES, THE PROCESSING FEES ARE PART OF THE SALES PRICE AND ARE TAXABLE.

October 17, 2014

Re: Technical Assistance Advisement 14A-025
Restaurant Delivery Charges
Taxpayer Name: XXXX
Taxpayer ID Number: XXXX
Sales and Use Tax
Sections 212.05 and 212.02, Florida Statutes (F.S.)
Rule 12A-1.045, Florida Administrative Code (F.A.C.)

Dear XXXX:

This response is in reply to your letter to the Department, dated XXXX, in which you are requesting the Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to s. 213.22, F.S., and Chapter 12-11, F.A.C., regarding whether the restaurant delivery charges and processing fees are subject to sales tax imposed under Chapter 212, F.S. An examination of your petition has established that you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for issuance of a TAA.

ISSUE

Whether delivery charges and processing fees are part of the sales price of meals sold and delivered to customers, and, therefore subject to tax.

FACTS

Taxpayer sells delivery service franchises under the trademarked name XXXX. As stated in your letter, when a franchise is established, it enters into exclusive contracts with local restaurants to provide third-party delivery services for food that would otherwise not be available on a delivery basis.

As part of the agreement with the restaurants, each restaurant dictates what menu items will be available and at what price. In addition to the menu price, the franchisee imposes an additional delivery fee and a processing fee independently determined by the franchisee.

Through the franchisee website, the customer can order food from one (or several) of the participating restaurants available. Once the customer chooses which menu item(s) they desire, the order is placed on franchisee's web portal and electronically communicated to the chosen restaurant(s). Upon finalizing the order, the customer is billed by the franchisee for the price of the food, sales tax, a separate processing fee for placing the order through the franchisee website, and a separate delivery fee (if applicable). The food delivery services are provided by a non related third-party.

It is noted that not all of the participating restaurants allow for a pick-up option. For the participating restaurants that do allow customers to pick up their order, there is no delivery charge imposed by the franchisee. From the money collected, the franchisee keeps the processing fee and the delivery fee (if applicable) and withholds "as a commission" a percentage of the value of the sales price of the food purchased. Pursuant to the sample contract provided, the franchisee will receive a commission equal to 30% of the amount of revenue collected from the restaurant's food sales in delivery and coupons, and 20% for pick up food sales for the period in which the collected amount is being remitted.

On a weekly basis, the franchisee remits to each restaurant the money collected for the sale of the food, less the commission and the sales tax collected. The franchisee also remits the full delivery fee to the third-party delivery company. Currently, the franchisee does not charge sales tax on the processing fee or the delivery fee.

REQUESTED ADVISEMENT

You are requesting clarification on the following issues:

> Should the franchisee charge sales tax on the delivery fee for those restaurants that do not allow pick-up as an option, and if so, should the franchisee charge sales tax on those that do allow pick-up as an option?
>
> Should the franchisee charge sales tax on the separately itemized processing fee?

> If the delivery fees and the processing fees are subject to sales tax, should the franchisee remit the sales tax it collects directly to the Department of Revenue, or may it forward it to the restaurants for them to remit?

You assert that the delivery and service fees are separate from the sale of meals and, therefore, are not subject to sales tax. You state that there are two transactions that are occurring when a customer places an order to purchase a meal: (1) the customer is ordering the food from the restaurant, with the franchisee acting only as a conduit (or broker) for such order; and (2) the customer is ordering the services offered by the franchisee, most notably the delivery service, but also the convenience of having the franchisee place the order for the customer. You contend that the delivery charge and the processing fee do not impact the price of the meal being sold and the transaction can be restructured in a manner that would cause the delivery charge and the processing fee to be nontaxable without impacting the sales price or the amount collected from the customer.

LAW & DISCUSSION

Section 212.05(1)(a)1a., F.S., provides in part that:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state ....
>
> (1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
>
> (a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state ….

Moreover, as provided in s. 212.15, F.S., taxes imposed under Chapter 212, F.S., are state funds from the moment of collection. The tax is measured against the total sales price of the item sold.

Section 212.02(l5)(a), F.S., defines “Sale” as:

> (a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

Section 212.02(16), F,S., defines “Sales price” in part as:

> (16) “Sales price” means the total amount paid for tangible personal property, including any services that are a part of the sale ….

When services are rendered and charged to the customer as part of the total charge for the item(s) sold, such services are also subject to tax, even though they may be separate charges on the invoice or bill. A service can be defined as any duty or obligation necessary or required by the seller to facilitate the sale of tangible items sold to the customer. In instances where the transaction would be impossible or impractical without the service, sales tax is due on the service. Transportation or delivery charges are examples of services typically sold in conjunction with the sale of tangible personal property.

Rule l2A-1.045, F.A.C., provides in part:

> (1) "Transportation charges" include carrying, delivery, freight, handling, pickup, shipping, and other similar charges or fees.
>
> (2) Transportation charges which are not separately stated on an invoice or bill of sale, but are included in the sales price of taxable tangible personal property, are subject to tax.
>
> (3)(a) Where the seller agrees to deliver tangible personal property to some designated place and the purchaser cannot elect to avoid the charge for transportation services, the charge for the transportation service is subject to tax, even if separately stated on an invoice or bill of sale.
>
> * * *
> (4)(a) The charge for transportation services is not subject to tax when both of the following conditions have been met:
>
> 1. The charge is separately stated on an invoice or bill of sale; and
>
> 2. The charge can be avoided by a decision or action solely on the part of the purchaser ….

Rule 12A-l .045, F.A.C., which deals with sales tax on transportation charges, recognizes the decisions in Florida Hi-Lift v Department of Revenue, 571 So.2d 1364 (Fla. 1st DCA 1990), and Department of Revenue v. B&L Concepts, 612 So.2d 720 (Fla. 5th DCA 1993).

In Florida Hi-Lift v. Department of Revenue, the court found that the rental of equipment was a "sale"; that Rule 12A-1.045, F.A.C. was applicable; and that the transportation charges, while incidental to the sale, were not part of the total sales prices because the equipment lease was FOB lessor's site, and the lessee had the option of picking up the equipment or having delivery made by the lessor.

In Department of Revenue v. B&L Concepts, the court held that the proper line of demarcation was that if service charges or fees incidental to the sale or lease are imposed at the option of the seller, those service charges or fees are a part of the "sales price" and are subject to the sales tax, but if such service charges or fees are separately itemized and applied at the sole option or

election of the purchaser, or can be avoided by decision or action on the part of the purchaser, then those charges and fees are only incidental to the sale, are not part of the "sales price" and are not subject to sales tax. Applying this line of reasoning, the court held that late fees and delivery fees were to be excluded from the taxable "sales price," since the late fees could be avoided by the timely return of the rented items and because of the optional nature of the delivery fee.

When the service is incidental to the sale, sales tax is not due on the service. In other words, when the transaction (i.e., sale of taxable goods) is consummated prior to the point when the service(s) becomes a part of the process, these services are not subject to tax.

CONCLUSION

With respect to the delivery charges where customers do not have an option to pick up the meal from the restaurant, since the delivery charges cannot be avoided by decision or action on the part of the customer, the charges are part of the sales price of the meal and are taxable. The term "sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale. Here, the customer is purchasing a meal and the convenience of having the meal delivered directly to them by the franchisee, and the charge cannot be avoided. Even though the delivery of the meal is a service, it can not be treated separately from the sale of the meal.

With respect to the sales of meals involving the delivery charges where pick-up is an option, since the delivery charges are separately itemized and can be avoided by decision or action on the part of the customer, the charges are not part of the sales price of the meal and are not taxable. In all instances, the processing fees are part of the sales price and are taxable.

With respect to your question concerning whether the franchisee should remit the sales tax collected directly to the Department of Revenue, the answer is "yes." The franchisee is not acting in the capacity of a conduit or agent for a restaurant to collect money from the customer. According to the agreement between the taxpayer and the restaurants, the franchisee purchases the meals at a discount (e.g., 30%) off the menu price. Revenue generated by the franchisee does not belong to the restaurant and at no time does this revenue become the property of the restaurant. Franchisee conducts its business, advertises, and collects revenue as a separate and distinct legal entity, and not as a distributor or salesperson for participating restaurants. It is the franchisee's intent to attract public attention to it as a person in the business of selling to its customers a variety of meals prepared by a variety of restaurants, to be delivered directly to the customer. Accordingly, all taxes due from the purchasers must be remitted directly to the Department of Revenue by the franchisee.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S. which is binding on the department only under facts and circumstances described in the request for this advice, as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific

situation summarized above. You are advised that 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 treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850) 717-7202.

Sincerely,

Richard R. Parsons
Tax Law Specialist
Technical Assistance & Dispute Resolution
(850) 717-7202

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