Memo

Re: Sales Tax & Catering - Updates and Changes

By: Heather Bronnink, Assistant Tax Director

Dated: July 1, 2009

The following pages contain information substantiated by the MN Department of Revenue clarifying when sales tax is applicable to catering purchases directly made by the University of Minnesota. In order to reflect the most current information, items affected by recent legislative and tax rate changes which are no longer accurate are crossed with red lines.

In particular, as of July 1, 2009 the University is no longer exempt from sales tax when purchasing alcoholic beverages. Therefore the University must now pay sales tax on purchases of alcoholic beverages, bar minimum fees, and delivery of alcoholic beverages. In areas where it applies, the University is also subject to local alcohol and restaurant taxes on alcoholic beverages.

For the most recent tax rate information we advise you to consult the MN Department of Revenue. A sales tax calculator can be found at:

http://www.taxes.state.mn.us/taxcalc/index.shtml

If you have questions regarding sales tax on catering purchases by the University, please contact University Tax Management at 612-624-1053 or TaxHelp@umn.edu

Driven to Discover™
August 9, 2007

Heather Broneak
University of Minnesota
Tax Department
Suite 206, West Bank Office Building
1300 South Second Street
Minneapolis, Minnesota 55454

Dear Ms. Broneak:

In response to your letter of June 28, 2007, regarding the taxability of items and services purchased by the University of Minnesota, the department agrees with the conclusions and other statements made in your letter except as noted below. The sales tax policy team has reviewed the department's position on the taxability of bar minimum fees and it is the department's position that to the extent that it can be documented, the bar minimum fees can be apportioned between the sales of soft drinks and alcoholic beverages. If the percentage of the types of drinks served cannot be ascertained, the sales tax would apply to the total bar minimum fees.

Charges for the use of rooms at recreational facilities are subject to the sales tax in addition to the sales tax applying to taxable lodging. All exemption certificates must be fully completed in order to purchase items exempt for resale at qualified fundraising events.

If you have any further questions regarding sales or purchases made by the University of Minnesota, please contact me.

Sincerely,

[Signature]
Gregory J. Heck, Attorney
Legal Services Unit
(651) 556-4070
Mr. Gregory Heck  
Minnesota Department of Revenue  
Appeals and Legal Services Division, Suite 4100  
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St. Paul, MN 55146-2220  

June 28, 2007  

Dear Mr. Heck,  

Your written opinion is respectfully requested regarding the taxability of certain items and services purchased by the University of Minnesota (U of M). The transactions in question and the applicable exemptions and definitions are laid out below.  

Facts  
The U of M frequently hires the services of caterers to provide refreshments at various University functions. The caterers provide foods, beverages and services, with a separate line item charge for each type of purchase. The University makes a payment by check directly to the caterer. It appears that some of the line items are subject to tax for all purchasers, but, based on the following statutory provisions, some should be exempt when purchased by the U of M.  

Statutory Provisions and Application  
Minnesota Statutes Section 297A.70, Subdivision 2, provides an exemption for certain sales to government. The U of M is a governmental entity in that it is an integral part of the State of Minnesota. Under clause (a)(2) of Minn. Stat. Section 297A.70, Subdivision 2, the U of M is expressly included in this exemption.  

This statutory exemption for the U of M covers all purchases except those listed in Section 297A.70, Subdivision 2, Paragraph (b). Among other items, Clause (4) of Subdivision 2, Paragraph (b) excludes prepared food, candy and soft drinks from the exemption.  

Prepared Food  
Prepared food is defined under Minn. Stat. Section 297A.61, Subdivision 31, to mean food that meets either of the following conditions:  

1. the food is sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws; or  
2. the food is sold in a heated state or heated by the seller or two or more food ingredients are mixed or combined by the seller for sale as a single item, except for:  
   i. bakery items, including, but not limited to, bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas;  
   ii. ready-to-eat meat and seafood in an unheated state sold by weight;  
   iii. eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its food code so as to prevent food borne illnesses; or  
   iv. food that is only sliced, repackaged, or pasteurized by the seller.
Soft Drinks
Soft drinks are defined under Minn. Stat. Section 297A.61, Subdivision 32, to mean: nonalcoholic beverages that contain natural or artificial sweeteners. Soft drinks do not include beverages that contain milk or milk products; soy, rice, or similar milk substitutes; or greater than 50 percent vegetable or fruit juice by volume.

Candy
Candy is defined under Subdivision 33 of Section 297A.61, to mean: a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. Candy does not include any preparation containing flour and must require no refrigeration.

Alcoholic Beverages
The general food exemption is found in Minn. Stat. Section 297A.67, Subdivision 2. This provision makes food and food ingredients exempt from tax, with the following exceptions: “candy, soft drinks, food sold through vending machines, dietary supplements, and prepared foods.” The statute goes on to state that “food and food ingredients do not include alcoholic beverages and tobacco. For purposes of this subdivision, ‘alcoholic beverages’ means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.”

According to the food exemption, alcoholic beverages are not food. To meet the definition of prepared food, an item must first be food. Alcoholic beverages cannot be considered prepared food since they are not food. Also, alcoholic beverages are expressly excluded from the definition of soft drinks. Finally, alcoholic beverages are not candy. Consequently, alcoholic beverages are not excluded from the U of M’s exemption, so they are not subject to sales tax when purchased by the U of M.

There is also a 2.5% gross receipts tax imposed on the sale of alcoholic beverages under Minn. Stat. Section 295.75. Pursuant to Subdivision 6 of Section 295.75, all the exemptions applicable to the taxes imposed under Chapter 297A are applicable to the taxes imposed under Section 295.75. Accordingly, the U of M is also exempt from the gross receipts tax on alcoholic beverages.

Delivery Charges
According to the definition of “sales price” found in Minn. Stat. Section 297A.61, Subdivision 7, delivery charges are part of the measure subject to sales tax. If the item being sold is subject to tax, any related delivery charges are subject to tax. For example, delivery charges for bringing taxable food to a U of M event would be subject to tax. However, if the item being delivered is not subject to tax, the related delivery charges are also not subject to tax. For example, delivery charges related to the delivery of tables to a U of M event would not be subject to tax since the tables themselves are not taxable.

Security Services
Security services are generally taxable pursuant to Minn. Stat. Section 297A.61, Subdivision 3(g)(6)(iv). However, the statute excludes certain security services, as follows: “not including services performed within the jurisdiction they serve by off-duty licensed peace officers.” If the security services are provided by an off-duty licensed peace officer working within his or her normal jurisdiction, they are not a taxable service. Even if the security services don’t meet this peace officer exclusion and would normally be taxable, they are not excluded from the U of M’s exemption, so security services are exempt when purchased by the U of M.
Movie or Theater Tickets
Movie and theater tickets are generally subject to tax under Minn. Stat. Section 297A.61, Subdivision 3(g)(1) as the privilege of admission to a place of amusement. If a caterer has purchased tickets and paid tax on the sales price, and then charges a customer this total cost without mark-up, no additional tax would be due. However, the caterer could provide a resale exemption certificate to the ticket seller and buy the tickets exempt from tax. The caterer could then sell the tickets to the U of M exempt from tax, since the tickets are not excluded from the U of M’s exemption.

Bar Minimum Fees
Both taxable soft drinks and nontaxable alcoholic beverages are typically served by a caterer. The bartender uses a method of keeping track of the number of soft drinks and the number of alcoholic beverages that are sold, and the customer is charged different per drink charges based on the type of drinks served.

Sometimes a caterer will impose a minimum bar purchase amount. For example, a customer is required to pay $500 for bar purchases. If the caterer serves $200 of soft drinks and $200 of alcoholic beverages, the customer would still need to pay $100 to meet the $500 minimum. It is not clear whether this payment to meet the minimum is subject to tax, and if so, what rate of tax would apply. However, it seems reasonable that if tax is charged on the minimum fee, the tax rate charged should reflect the percentage of the types of drinks served. In our example, 50% of the items served were soft drinks and 50% were alcoholic beverages, so 50% of the $100 minimum would be subject to the soft drink sales tax rate, and 50% would be subject to the alcohol rate. When the U of M is the customer, tax would only apply to the proportion related to the soft drinks, since the U of M does not have to pay tax on alcoholic beverages.

Local Taxes
The tax rate imposed will be controlled by the jurisdiction where the event is held. For example, if a caterer provides refreshments at the U of M Law School which is in the downtown district, the food and beverage charges will be subject to a 6.5% state rate, a Minneapolis tax of .5%, a Hennepin County tax of .15% and a Downtown Minneapolis Restaurant Tax rate of 3%. Charges for alcoholic beverages will not be subject to tax, so the Downtown Minneapolis Liquor Tax will not apply.

Bundling
Charges for taxable items must be listed separately from exempt items on an invoice. If the charge for a taxable item is bundled with the charge for an exempt item, it is understood that the entire charge is taxable.

Conclusions
Based on the above statutory provisions, it appears that charges for the following list of items are subject to tax when purchased by the U of M from a caterer:

- Food, including meals, buffets, snacks, hors d’oeuvres, appetizers, desserts, and any other item meeting the definition of prepared food
- Beverages, including soft drinks or other drinks that meet the definition of prepared food
- Services related to preparing food, candy or soft drinks, including bar minimum fees related to soft drinks
- Related delivery charges

Alcoholic Beverages
Charges for the following items are not excluded from the U of M's exemption, and consequently are not subject to tax if separately stated:

- Alcoholic beverages
- Bar minimum fees related to alcoholic beverages
- Rentals of equipment, including tables and chairs
- Rentals of utensils, including plates, glassware and flatware
- Rentals of other tangible personal property, such as tablecloths, vases and centerpieces
- Flowers
- Services related to these exempt items, such as a set-up charge for tables
- Security services (also see bullet below re: off-duty police officer)
- Related delivery charges
- Movie or theater tickets

The following items are not subject to tax for any buyer:

- Room charges or facility fees, other than taxable lodging
- Security services provided by off-duty licensed peace officer within normal jurisdiction served
- Sales for resale where ST3 is provided, including for qualified fundraising activities
- Labor other than to prepare food, including event supervisor charges, service staff, bartender fees

Summary

The U of M must pay sales tax on purchases of prepared food, candy and soft drinks. Sales by a caterer of items other than prepared food, candy and soft drinks that are separately stated are not taxable to the U of M.

Please let me know if additional information is needed. Your guidance on the taxability of these charges is greatly appreciated. Thank you for your assistance.

Sincerely,

Heather Broneak
Tax Analyst