

**IN THE MATTER OF THE PETITION OF
"Petitioner"
FOR A DECLARATORY RULING**

Doc#6197, Effective 1/12/96

The Secretary and General Counsel of "Petitioner" requested a ruling of the New Hampshire Department of Revenue Administration ("Department") with respect to certain liability for collection and remission of tax under the New Hampshire Meals and Rooms Tax, RSA 78-A. Pursuant to RSA 541-A:1, IV, 541-A:2, I(d) and Rev. 209.01 et seq., this request is being treated as a petition for declaratory ruling.

Determination Requested by the Petitioner

Petitioner requests a ruling stating that the meals it furnishes to residents and guests in its various food service facilities will not be subject to the meals and rooms tax even though it will be licensed to provide alcoholic beverages to such residents and guests. In the alternative, Petitioner requests that the Department rule that it will be exempt from collecting and remitting tax if it does not obtain a license to serve alcoholic beverages.

Facts Presented by the Petitioner

Petitioner made the following representations of relevant facts:

1. "A" is the New Hampshire registered Trade Name of "B Corporation", a New Hampshire Non-Profit Corporation, exempt from federal income taxation pursuant to ' 501(c)(3) of the Internal Revenue Code. The Corporation is the owner of a continuing care retirement community presently under construction in, New Hampshire.
2. "A" will consist of 112 residential units, 30 assisted living units and 15 skilled nursing beds. When needed in later years, 6 assisted living units will be converted to 12 additional semi-private nursing beds. The residential units will vary in size from a one bedroom apartment to a three bedroom cottage.
3. The Community will be open to persons age 62 and over. The residents who will occupy independent apartments must be able to demonstrate that they are in good health, able to live independently and capable of meeting their financial responsibilities.
4. "A" has received a Certificate of Authority as a continuing care community from the Insurance Department of the State of New Hampshire under the provisions of RSA 420-D. It also has a Certificate of Need from the Health Services Planning and Review Board of the State of New Hampshire under the authority of RSA 151-C and is registered with the Director of Charitable Trusts in the office of the New Hampshire Attorney General pursuant to the authority of RSA 7:19-32-a. Its financing is underwritten by a \$..... bond indenture from the New Hampshire Higher Educational and Health Facilities Authority with the United States Trust Company of New York as Bond Trustee.

5. In addition to the living units and nursing beds, the project will contain a community center of 38,000 square feet which will include dining rooms, lounge, lobbies, library, social and recreational facilities, and an indoor swimming pool.

6. "A", as part of its monthly charge to residents, will provide one meal a day to independent residents and three meals to those in the health center. The meals provided to the independent residents will be served in a full-service dining room with full waitress and linen service and a seating capacity for 160 persons. Residents may elect to take additional meals in the dining room at the prevailing charges for such meals and guest meals will be provided for guests of a resident at "A" at prevailing fees for guest meals. Private dining rooms are also available for family gatherings or other special occasions.

7. The present intention of "A" is to provide alcoholic beverages to its residents and guests in its lounge to be constructed in the Community Center as well as in its adjoining dining rooms. Back on April 27, 1995, "A" obtained a declaratory ruling from the State Liquor Commission that "A" was eligible to receive a license as a full service restaurant with cocktail lounge, even though those facilities are not open to the general public, but instead are available only to "A" residents and their guests.

Statutes and Rules At Issue

Statutes

RSA 78-A: 3, X (c)(1) relative to the taxability of meals served on the premises of a non-profit religious or charitable organization.

RSA 78-A: 3, X (c)(4) relative to the taxability of meals served on the premises of a hospital, sanitarium, convalescent home, nursing home, or home for the aged.

RSA 78-A: 3, X (c)(7) relative to the taxability of meals sold by non-profit organizations.

Rules

N.H. Code Admin. R. Rev 701.07 relative to the definition of "non-profit organization."

N.H. Code Admin. R. Rev 702.04 relative to the taxability of meals sold to the public on hospital property.

N.H. Code Admin. R. Rev 702.04 relative to the taxability of meals prepared and served by a non-profit organization required to have a liquor license.

Findings

Petitioner represents that it will be preparing and serving meals to residents and guests at its dining room and lounge facilities, which will be operated very similarly to a full service restaurant with wait staff. Some meals of residents are included in the monthly charge for services, while other meals may be purchased by residents

and guests separately. Residents who are accommodated in Petitioner's health care facilities will be served three daily meals billed in their monthly service charge.

RSA 78-A:3, X (c)(1) provides that the following is not a taxable meal:

(1) Meals served or furnished on the premises of a nonprofit corporation or association organized and operated exclusively for religious or charitable purposes, in furtherance of any of the purposes for which it was organized; with the net proceeds of the meals to be used exclusively for the purposes of the corporation or association;

In order to qualify for exemption under this paragraph, a taxpayer is required to be operating exclusively for charitable purposes. RSA 78-A:3, X (c)(1) does not define "charitable purpose"; nor is the term defined elsewhere in RSA Chapter 78-A.

Petitioner is qualified as an organization exempt from federal income taxation under IRC ' 501(c)(3). It is also registered with the New Hampshire Attorney General's Office, pursuant to RSA 7:19-32-a, relative to the requirements imposed on trustees holding property for charitable purposes. However, RSA 78-A:3, X (c)(1) does not reference IRC ' 501 (c)(3) as a determinant of charitable status. Consequently, Petitioner's federal income tax status is of no import in determining whether it is exempt under this section. RSA 78-A:3, X (c)(1) also fails to reference RSA 7:19-32-a. "A's" registration with the director of charitable trusts is therefore not relevant to whether it is "charitable" for meals and rooms tax exemption purposes.

Since the statute does not provide a definition, the common and approved usage of the term must be looked to for guidance. RSA 21:2. The several definitions of "charity" and "charitable" organizations found in both ordinary and legal dictionaries have been summarized as requiring that the charitable organization "provide a service that socially benefits mankind in general, or specifically, a broad segment of those in need." Kendal at Hanover v. Town of Hanover, Board of Tax and Land Appeals, Docket No. 12827-92-EX, slip. op. at 11 (December 13, 1994).

Petitioner has not represented that it would provide a service to "a broad segment of those in need." To the contrary, Petitioner states it will only accept as residents those persons who are "capable of meeting their financial responsibility." As a consequence, Petitioner does not qualify as having an exclusively charitable purpose as required by the statute.

RSA 78-A:3, X(c)(4) provides that the following are exempt from tax:

(4) Meals served or furnished on the premises of a hospital and served in any hospital licensed under RSA 151, except for meals sold in any restaurant which offers its accommodations to the public, or of a sanitarium, convalescent home, nursing home, or home for the aged;

Relative to this exemption N.H. Code Admin. R. Rev 702.04, Hospitals, provides:

If a cafeteria or restaurant is operated on hospital property and meals are available to the public, all non-patient meals sold shall be subject to tax unless such meals are furnished by a non-profit organization.

Petitioner has not represented that it is a hospital within the exemption provided in RSA 78-A: 3, X(c)(4) or N.H. Code Admin. R. Rev 702.04. Petitioner does state that it received a certificate of authority pursuant to the provisions of RSA 420-D relative to the licensing of "continuing care communities". Such "continuing care communities" are not one of the exempt facilities enumerated under RSA 78-A: 3, X(c)(4), however.

Petitioner also represents that it has applied for and received a certificate of need from the New Hampshire State Health Services Planning & Review Board pursuant to RSA Chapter 151-C. RSA Chapter 151-C regulates the formation or creation of new health care facilities. See RSA 151-C:2, VIII and RSA 151-C:8. RSA 151-C:2, XV-a defines "health care facility" and includes therein "nursing homes." "Nursing home or facility" is defined as a place that provides "basic domiciliary services (board, room, laundry), continuing health supervision under competent professional medical and nursing direction, and continuous nursing care as may be individually required." RSA 151-C:2, XXVI (Supp. 1995). Petitioner represents that part of its facilities will consist of "15 skilled nursing beds." Petitioner has not so represented but it will be presumed for the purposes of this ruling that the certificate of need granted to Petitioner pursuant to RSA Chapter 151-C relates to the 15 nursing beds. RSA 78-A: 3, X(c)(4) specifically provides an exemption from tax for meals served or furnished on the premises on a nursing home. Meals provided to residents occupying the skilled nursing beds, therefore, are not taxable under the meals and rooms tax.

Petitioner also indicates that it will have 30 assisted living units available to residents. RSA 78-A: 3, X(c)(4) specifically provides an exemption for meals served or furnished on the premises of a "home for the aged". Petitioner has not provided sufficient detail as to the types of services that will be provided to occupants of assisted living units. Without sufficient information, no ruling can be made on the taxability of the meals served in these units. However, if the services provided to residents of the assisted living units are the same services that would ordinarily be provided in a "home for the aged", this portion of the Petitioner's facilities would qualify for exemption under RSA 78-A: 3, X (c)(4).

RSA 78-A: 3, X(c)(7) provides that meals prepared and sold by a non-profit are non-taxable. This provision contains the following caveat:

However, if the nonprofit organization is required to have a license issued by the liquor commission other than a license issued pursuant to RSA 178:20, V(I), the meals are taxable meals;

N.H. Code Admin. R. Rev 702.18, Meals Prepared and Served by Non-Profit Organizations Other Than Educational Institutions, interprets the caveat as follows:

Meals prepared and served by a non-profit organization, which is required to obtain a liquor license from the New Hampshire liquor commission, other than a one-day license pursuant to RSA 178:20 V(I), shall be taxable. These meals shall be taxable with or without the sale of alcoholic beverages and shall be taxable regardless of the purchaser, including but not limited to members, officers and guests.

New Hampshire Code Admin Rule Rev 701.06 defines the term "non-profit organization" as used in RSA 78-A:3, X(c)(7) to include organizations which qualify under IRC ' 501(c)(3) for federal income tax exemption. Since Petitioner represents

that it has qualified for such federal exemption, it is clearly a "non-profit organization" within the meaning of the rule.

Petitioner represents that it intends to apply and is eligible for a license from the New Hampshire Liquor Commission to serve alcoholic beverages in its dining and lounge facilities open to residents and guests. RSA 78-A:3, X (c)(7) clearly excepts from the nonprofit organization tax exemption organizations that are in such situation. Therefore, if Petitioner obtains such a liquor license, it will be required to collect and remit meals and rooms tax on the meals that it prepares and serves in its facilities, except those facilities which qualify as under other provisions of the statute noted previously.

Petitioner states that it will provide one daily meal to independent living residents, i.e., those not occupying the health care facilities, as part of its monthly charge to such residents. The taxable amount of such meal will consist of the entire monthly fee charged the resident unless the fee for the meal is separately stated. See N.H. Code Admin. R. Rev 702.10. However, authorization to include the meal portion of the monthly fee without separately stating the amount may be obtained by requesting prior written permission pursuant to N.H. Code Admin. R. Rev 702.10(c).

Ruling

Based on the statutory provisions discussed above, the Department makes the following rulings:

- (1) Petitioner is not exempt under RSA 78-A:3, X (c)(1) from the requirement to collect and remit meals and rooms taxes on taxable meals prepared and served to residents because it does not qualify as operating exclusively for a charitable purpose.
- (2) Petitioner is not exempt under RSA 78-A:3, X (c)(4) from the requirement to collect and remit meals and rooms taxes on taxable meals prepared and served to residents, except the residents that occupy its 15 bed nursing care facilities, because it is neither a hospital or a nursing home.
- (3) Petitioner is not exempt under RSA 78-A:3, X (c)(4) from the requirement to collect and remit meals and rooms taxes on taxable meals prepared and served to residents of its 30 assisted living units because it has not shown that it is a home for the aged.
- (4) Petitioner is not exempt under RSA 78-A:3, X (c)(7) from the requirement to collect and remit meals and rooms taxes on taxable meals prepared and sold to its residents and their guests because it intends to obtain a liquor license and serve alcoholic beverages.
- (5) Petitioner is exempt under RSA 78-A:3, X (c)(7) from the requirement to collect and remit meals and rooms taxes on taxable meals prepared and sold to its residents and their guests if it does not obtain a liquor license to enable it to serve alcoholic beverages.

Stanley R. Arnold, Commissioner