

STATE OF NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION

IN THE MATTER OF THE PETITION OF

FoodCo, LLC

FOR A DECLARATORY RULING

REDACTED DOCUMENT

Document # 13176 Effective 3-4-21

Pursuant to RSA 541-A:1, V and RSA 541-A:16, II(b) and N.H. Code of Administrative Rules, Rev 209.01, the Petitioner requests a Declaratory Ruling with respect to RSA 78-A, the Meals & Rooms (Rentals) Tax.

Pursuant to N.H. Code of Administrative Rules, Rev 209.02, this Declaratory Ruling is issued to the Petitioner with respect to the particular circumstances and facts discussed herein and represents a holding of the New Hampshire Department of Revenue Administration (“Department”) on those circumstances and facts for Petitioner only.

FACTS PRESENTED BY THE PETITIONER

The Petitioner, FoodCo, LLC (“Petitioner”) alleges that it provides meals and management services to a fraternity, on the premises of a fraternity house at a public university, though a meals and management services plan.

Under the meals and management services plan, Petitioner provides a customized menu, provides all food preparation services including dishwashing, and the fraternity supplies all facilities and appliances for Petitioner.

The Petitioner purchases all food, beverages and supplies, including plates, flatware, glassware, and napkins, both disposable and non-disposable. Petitioner also purchases all cleaning supplies, and cleans and maintains the fraternity’s appliances and facilities. Petitioner provides the labor for providing such services as well as all payroll and legal compliance functions. The fraternity pays Petitioner for its services and such fees are reimbursed by individual fraternity members.

The fraternity is a professional-social, agricultural social club exempt from federal taxation under I.R.C. § 501(c)(7). When members join the fraternity they must sign a covenant with the fraternity, under which the member agrees to “[p]articipate regularly in all Chapter activities,” “[s]trive for academic achievement and practice in academic integrity,” and “[l]ive in the Chapter house.” Pursuant to this Covenant, the fraternity promises to “provide meaningful programs and activities,” and provide “the benefit of our support and experience so that you may

obtain a high level of scholarship, maturity, and awareness of Fraternity ideals, when united with genuine compassion and concern for your fellow man, will help make you a well-rounded individual.”

DETERMINATION REQUESTED BY THE PETITIONER

The Petitioner requests a determination by the Department that because it provides meals and management services on the premises of a section 501(c)(7) non-profit organization, it is exempt from paying Meals and Rooms Tax (MRT) under its meals and management services plan with the non-profit organization.

REVISED STATUTES ANNOTATED AT ISSUE

RSA 78-A

OTHER LAWS OR RULES

N.H. Code of Admin. Rules, Rev 701 & 702

I.R.C. § 501(c)

PETITIONER’S REPRESENTATIONS

The Petitioner represented to the Department that to the best of its knowledge, the issue and particular circumstances which are the subject of this petition:

- a. Are not under examination by the Department;
- b. Have not been examined by the Department;
- c. Are not under consideration by the Department in connection with a return of a prior period; and
- d. Are not pending in litigation.

DISCUSSION

A. APPLICABLE LAW.

RSA 78-A imposes a tax upon meals. A “taxable meal” is a meal for which a charge is made, that is purchased from a person in the business of operating a restaurant, which is subject to a tax under RSA 78-A:6. *See* RSA 78-A:3, XXV.

The definitions of “meal,” “restaurant,” “catering business,” and “nonprofit organization,” are all applicable. Further, what constitutes an “exception” to “taxable meals” under RSA 78-A:6-c is also applicable.

“Meal” means “any food or beverage, or both, including food products, prepared for human consumption and served by a restaurant in such form as to be available for immediate

consumption without further significant preparation, whether the food or beverage is provided for consumption on or off the restaurant premises, whether the food or beverage is served for consumption on or off the restaurant premises.” RSA 78-A:3, VIII.

“Restaurant” means “an eating or drinking establishment that is primarily engaged in the business of providing meals for which a charge is made.” RSA 78-A:3, XX. “The term includes, but is not limited to, a restaurant portion as defined in paragraph XXI, cafe, lunch counter, private or social clubs, cocktail lounges, hotel dining rooms, catering business, tavern, diner, snack bar, dining room, food vending machine, booth at a fair or festival, coffee shop, food truck, ice cream stand, salad bar, street cart, and any other eating place or establishment primarily engaged in the business of providing meals whether stationary or mobile, temporary or permanent. The term includes fairs and festivals where the price of admission entitles the purchaser to food or beverages, or both, including alcoholic beverages.” *Id.*

“Nonprofit organization” means “an organization that is exempt from federal income taxation under section 501(c)(3), (4), (5), (6), (7), (8), (10), or (19) of the Internal Revenue Code, and any municipality of the state.” RSA 78-A:3, X. “The term includes ‘nonprofit corporation or association.’” *Id.*

“Catering Business” means “a food service enterprise or a person engaged, as part of their ordinary course of business, in providing taxable meals at fixed or various locations other than at a restaurant licensed under RSA 78-A:4 owned or operated by the catering business.”¹ Rev 701.01.

Exceptions to paying MRT are set forth in RSA 78-A:6-c, which, in part, states:

I. Meals provided 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.

II. Meals provided by an organization operated for educational purposes, which organization is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code, either directly through facilities owned and operated by such organization or indirectly through a catering or food service enterprise under contract with such organization, but only if such meals are provided:

- (a) To students regularly attending the organization;
- (b) To employees, faculty members or administrative officers of the organization;
- (c) To volunteers providing services in connection with the organization; or
- (d) To persons other than individuals described in subparagraph (a), (b), or (c), but only if the meals are provided pursuant to an activity which is related to educational purposes and the sponsor of such activity is an organization exempt from federal income taxation under section 501(c) of the Internal Revenue Code or the federal or state government of an

¹ A Catering Business includes but is not limited to (a) Special events; (b) Banquets; (c) Receptions; (d) Picnics; (e) Bazaars; (f) Fairs; (g) Field days; (h) Outings; (i) Barbecues; (j) Mobile catering or vending trucks; (k) Cafeterias; (l) Private homes; (m) Concerts; or (n) Races. Rev. 701.01(a)-(n).

instrumentality thereof. For purposes of this subparagraph, “educational purposes” means:

(1) The instruction or training of an individual for the purpose of improving or developing the individual’s capabilities;

(2) The instruction of the public on subjects useful to the individual and beneficial to the community; or

(3) With respect to a specific educational organization, the conduct of alumni, student or athletic functions or events.

(e) The exemptions provided by subparagraphs (b) and (d) shall not apply if the meals are provided at a location where meals are offered to the general public on a regular and continuous basis without regard to an activity which is related to educational purposes.

VII. Meals prepared and sold by a nonprofit organization other than an educational institution, 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 organization. However, if the nonprofit organization is required to have a license issued by the liquor commission, other than licenses issued pursuant to RSA 178:22, V(1) for 3 or fewer days per year, the meals are taxable meals.

B. ANALYSIS OF THE EXEMPTION.

Under Rev. 701.01, the Petitioner is a private catering business which provides meals and management services on the premises of a fraternity house, a non-profit social club under I.R.C. § 501(c)(7). There are three (3) non-profit exceptions to paying MRT as set forth above in RSA 78-A:6-c, I, II, and VII.

The social club fraternity is a section 501(c)(7) nonprofit, therefore, RSA 78-A:6-c, II, does not apply. That exception is limited to section 501(c)(3) organizations. The law is well settled that while fraternities serve multiple purposes, such as social and educational purposes, they are primarily social clubs and are not considered section 501(c)(3) organizations. *See, e.g., Phinney v. Dougherty*, 307 F.2d 357 (5th Cir. 1962); *Davison v. Comm’r*, 60 F.2d 50 (2nd Cir. 1932); Rev. Rul. 69-573, 1969-2 C.B. 125. Thus, the fraternity’s legal status as a social club inescapably takes it outside the exception provided in RSA 78-A:6-c, II.

The social club fraternity does not “prepare and sell” the meals, therefore, RSA 78-A:6-c, VII, does not apply. That exception is limited to “[m]eals prepared and sold by a nonprofit organization.” The Petitioner “prepares and sells” the meals, not the fraternity.


The social club fraternity was not organized and does not operate *exclusively* for religious or charitable purposes, therefore, RSA 78-A:6-c, I, does not apply. *See Better Business Bureau v. United States*, 326 U.S. 279, 283 (1945) (the word *exclusively* plainly means that the presence of a single nonexempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of the truly exempt purposes). The fraternity substantially engages in activities that are not religious or charitable. Assuming, hypothetically, that the fraternity was

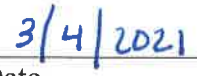
organized, and did operate, *exclusively* for religious and charitable purposes, the Petitioner's Contract and Summary Sheet (Petition, Exhibits 1 & 2) show that net proceeds, *i.e.* profit, from the meals sold are not exclusively used to further the fraternity's purposes for which it was organized. Petitioner keeps the net proceeds, not the fraternity, therefore, RSA 78-A:6-c, I, would not apply.

RULING

Based on the facts represented by the Petitioner, as well as the statutory and regulatory provisions discussed herein, including case law, the Department makes the following ruling:

The meals sold pursuant to the meals and management services plan between Petitioner and fraternity are taxable meals within the meaning of RSA 78-A:3, XXV and are not excepted from taxation under RSA 78-A:6-c.


Commissioner


Date