

FINAL PRIVATE LETTER RULING

REQUEST LETTER

10-007

May 11, 2010

VIA FEDERAL EXPRESS

Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134
Attn: Commissioners

**Request for Advisory Opinion: Sales Tax on Tips, Gratuities and Cover Charges
Pursuant to Utah Code Ann. Section 59-12-103**

Dear Commissioners:

The purpose of this letter is to request an advisory opinion from the Commission to assist us in advising our restaurant clients on two specific issues which arise under R865-19S-94 (the “**Sales Tax on Gratuity Rule**”).

1. The Sales Tax on Gratuity Rule. The Sales Tax on Gratuity Rule provides as follows:

- (1) Restaurants, cafes, clubs, private clubs and similar businesses must collect sales tax on tips or gratuities included on a patron’s bill that are required to be paid.
 - (a) Tax on the required gratuity is due from a private club, even though the club is not open to the public.
 - (b) Voluntary tips left on the table or added to a credit charge slip are not subject to sales tax.
- (2) Cover charges to enter a restaurant, tavern, club or similar facility are taxable as admission to a place of recreation, amusement or entertainment.

The Sales Tax on Gratuity Rule became effective on August 18, 2008.

2. Definition of Gratuities “That are Required to be Paid.” In the context of our clients’ operations, a question has arisen concerning the applicability of the Sales Tax on Gratuity Rule to a situation in which a restaurant includes a “suggested gratuity” on its bill for private events at the restaurant and for parties of a specified size or larger. Even though the amount

would be shown on the bill as a “suggested gratuity,” the restaurant would still leave the customer the option of leaving a different amount, or no amount, as a gratuity.

3. Applicability of Sales Tax to the Restaurant Tax Portion. In addition, our clients are encountering the additional issue of whether sales taxes required to be paid under Section 1 of the Sales Tax on Gratuity Rule include the one percent (1%) restaurant tax, or simply the State sales tax portion.

4. Request for Advisory Opinion. Accordingly, based on the foregoing, we hereby respectfully request an advisory opinion as to the following matters:

(a) Whether the Sales Tax on Gratuity Rule applies in situations such as those described in Section 2 above.

(b) Whether the Sales Tax on Gratuity Rule includes the one percent (1%) restaurant portion of the tax as described in Section 3 above.

Thank you very much for your assistance in this matter.

Very truly yours,

COMPANY

NAME

INITIALS

RESPONSE LETTER

August 9, 2010

NAME
COMPANY
ADDRESS

RE: Private Letter Ruling Request–Sales Tax Treatment of Gratuities and Interpretation of Utah Admin. Code R865-19S-94

Dear NAME:

You have asked two questions about Utah Admin. Code R865-19S-94. First, you questioned how R865-19S-94 would apply to the following situation:

a restaurant includes a “suggested gratuity” on its bill for private events at the restaurant and for parties of a specified size or larger. Even though the amount would be shown on the bill as a “suggested gratuity,” the restaurant would still leave the customer the option of leaving a different amount, or no amount, as a gratuity.

During a subsequent phone conversation, you clarified that although a suggested gratuity is on the bill, it is not totaled into the final amount due. Rather, the customer fills in the actual gratuity amount that he or she will pay.

Second, you asked whether R865-19S-94(1) requires restaurants, cafes, etc. to collect the one percent (1%) restaurant tax.

I. Applicable Law

Utah Code § 59-12-103, which imposes sales tax, states in part:

- (1) A tax is imposed on the purchaser . . . for . . .
 - (a) retail sales of tangible personal property made within the state;
 -
 - (e) sales of prepared food . . .
 -

Utah Code § 59-12-102(85) defines purchase price, in part, as follows:

- (b) "Purchase price" and "sales price" include:
 -

(iii) a charge by the seller for any service necessary to complete the sale . . .
.....

This definition, along with the others in Utah Code § 59-12-102, applies to all of Utah Code, Title 59, Chapter 12.

Utah Admin. Code R865-19S-94(1) states in part:

Restaurants, cafes, clubs, private clubs, and similar businesses must collect sales tax on tips or gratuities included on a patron's bill that are required to be paid.

.....

(b) Voluntary tips left on the table or added to a credit card charge slip are not subject to sales tax.

Utah Code § 59-12-603(1)(a)(ii) authorizes counties to impose a 1% tax on restaurants, as follows:

[A] county legislative body of any county may impose a tax of not to exceed 1% of all sales of the following that are sold by a restaurant:

- (A) alcoholic beverages;
- (B) food and food ingredients; or
- (C) prepared food; . . .

This 1% tax is commonly referred to as the restaurant tax or the tourism tax.

Page 2 of Utah State Tax Commission Publication 55, “Sales Tax Information for Restaurants,” instructs taxpayers about the restaurant tax:

Restaurant Tax

In addition to sales and use tax, county governments may impose a tourism tax of up to 1 percent on food and alcoholic beverages sales by restaurants.

.....

The following are subject to both sales and restaurant tax:

.....

- required gratuities

.....

Tips and Gratuities

Tips are subject to sales tax if they are mandatory and are shown on the invoice. Service charges, gratuities or other charges shown on the invoice are also subject to tax.

Any charges subject to sales tax are also subject to restaurant tax.

II. Analysis

A. The “Suggested Gratuity” You Have Described is Not Subject to Utah Sales Tax Because It is Not a Required Service Charge.

Under § 59-12-103(1)(a) and (1)(e), sales of food and beverages are subject to Utah sales tax as either sales of tangible personal property or sales of prepared food. Section 59-12-102(85)(b)(iii) provides that the purchase prices of food and beverages include *required* tips and gratuities because sellers impose these charges for services necessary to complete the sales of the food and beverages. Likewise, R865-19S-94 instructs restaurants, cafes, etc. to collect tax on required tips and gratuities but not on voluntary tips left on the tables or added to credit card charge slips. For your situation, you explained that the customer would have the option of choosing an amount different than the “suggested gratuity” printed on the bill, including leaving no amount at all. You also said that the customer was the one writing in the actual gratuity amount he or she would pay. These facts show that the “suggested gratuity” amounts are not charges by sellers for services necessary to complete the sales. Rather, the actual tips and gratuities are still voluntary, with the final amounts determined by the customers. Absent additional facts showing that a restaurant actually requires the gratuity even though “*suggested* gratuity” is printed on the bills, the “suggested gratuity” is not subject to Utah sales tax.

B. Required Tips and Gratuities are Subject to the 1% Restaurant Tax Based on Utah Statutory Law.

Under § 59-12-603(1)(a)(ii), a county may impose the restaurant tax, which is a tax of up to 1% on sales of food and beverages sold by a restaurant. As mentioned previously, under § 59-12-102(85)(b)(iii), the purchase prices of food and beverages include *required* tips and gratuities. Section 59-12-102(85)(b)(iii), defining purchase and sales price, applies to all of Chapter 12, including the restaurant tax located in Part 6. Thus, the sales prices of food and beverages sold by a restaurant includes any required tips and gratuities. Accordingly, Publication 55 instructs taxpayers that required gratuities and other mandatory charges are subject to both sales and restaurant tax. Lastly, although R865-19S-94(1) refers only to sales tax, and not restaurant tax, the 1% restaurant tax still applies to required tips, based on the Utah statutes.

III. Conclusions

For the facts and circumstances you described, a “suggested gratuity” printed on a bill is not subject to Utah sales tax unless a restaurant actually requires the tip or gratuity. Also, required tips and gratuities paid to restaurants are subject to the 1% restaurant tax based on Utah statutes. Although R865-19S-94 is directed specifically to § 59-12-103, it does not negate the separate requirements found in §§ 59-12-603 and 59-12-102(85).

This ruling is based on current law and could be changed by subsequent legislative action or judicial interpretation. Also, our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/aln
10-007