RESTAURANT ASSOCIATION MARYLAND

SENATE BILL 94

Sales and Use Tax – Gross Negligence Penalty for Underpayment

January 28, 2009

POSITION: Oppose

Mr. Chairman and Members of the Senate Budget and Tax Committee:

On behalf of the members of the *Restaurant Association of Maryland*, we strongly oppose Senate Bill 94, which would levy a penalty of 25 percent of the amount of underpaid sales tax if due to gross negligence, and specifies that an underpayment of 25 percent or more is *prima facie* evidence of gross negligence.

We certainly understand that Maryland's current fiscal woes may make an increase in tax penalties particularly attractive. As a trade association dedicated to protecting, promoting and improving Maryland's foodservice industry, we assist our members in complying with all areas of law and do not condone any type of tax evasion. However, our opposition to this legislation is predicated on the fact that a sales tax underpayment of 25 percent or more is not always the result of gross negligence and should not automatically be considered so. We have had experience with the Comptroller's staff misleading businesses into believing that they were in compliance with sales tax law when, in fact, they were not.

In 2005, we assisted one of our caterer members who owed additional sales tax on linen rentals as a result of a sales tax audit. In this case, the Comptroller found that the caterer had not paid required sales tax on linens, and assessed interest and penalties on top of the amount of underpayment. According to the Comptroller's interpretation of sales tax law, caterer linens and other rental equipment are not considered to be resale items and thus do not qualify for the sales tax resale exemption allowed for other retail items that are purchased to be resold *(Tax General Article, Sections 11-101 (h) (3) (ii) (1) and 11-101 (i)).* In other words, the Comptroller collects sales tax on caterer linens and other rental equipment twice – once when a vendor rents the item to a caterer, and again when the caterer re-rents the item to a customer for a party or event. Not only were the majority of our caterer and rental supply members unaware of this interpretation of sales tax law, but also the Comptroller's own sales and use tax experts in the Taxpayer Assistance office.

When we called the Taxpayer Assistance staff and asked to speak with a representative familiar with sales and use tax, we were told that linens and other items that caterers rent from vendors to then re-rent to customers are considered to be resale items, and that sales tax need only be collected when the caterer re-rents to the customer. Several other caterers got the same response from different members of the Taxpayer Assistance staff when we prompted them to call.

In a subsequent meeting with a senior official within the Comptroller's office, we were led to believe that the answer we received from Taxpayer Assistance staff was an isolated error. During the meeting, we requested that the senior official try calling the Taxpayer Assistance staff from a nearby speakerphone to ask the same question so that we could all hear the answer. The senior official declined. This left us to conclude that the Taxpayer Assistance staff sometimes provides incorrect compliance information to businesses.

When we asked how businesses and their accountants could get the most accurate compliance information, we were told to request such information in writing from the Comptroller's legal staff. When we asked for a copy of written information that may be sent to caterers who inquire about this particular compliance issue, we were told that no such document existed. Of course, we immediately sent a letter to our caterer members to ensure compliance with this recently-discovered interpretation.

In light of our experience, Senate Bill 94 raises serious concerns about the relationship between sales tax audits, interpretation of sales tax law, the accuracy of information received from Taxpayer Assistance staff and the fairness of the intent of this legislation. Even if guidance from the Comptroller's office was clear and consistent in matters of sales tax law, this legislation seems almost intentionally vague to give the Comptroller's audit staff broad leeway in determining the period subject to the proposed 25 percent penalty. Would the penalty apply to a single instance of underpayment, a year or an entire audit period? It also allows no exception for situations like the one we describe in which taxpayers acted in good faith.

For these reasons, we oppose Senate Bill 94 and request an unfavorable report.

Respectfully submitted,

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