

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(18)S
Sales Tax
May 24, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000822A

On August 22, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jo Ann Narducci, d/b/a D & V Foods, 1051 Main St., Holbrook, NY 11741-1618. Petitioner, Jo Ann Narducci, d/b/a D & V Foods, submitted additional informational by telephone on October 10, 2000.

The issue raised by Petitioner is whether food sold through its retail establishment to local bars, for resale to their patrons, is subject to sales tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner operates a retail delicatessen business. Petitioner purchases food that it prepares and sells to bars on a wholesale basis. The bars sell the food to the public on a retail basis and collect tax on such sales from their customers. The food sold by the Petitioner consists of items such as uncooked frozen personal size pizzas and cold cut, eggplant and meatball hero sandwiches.

Applicable Law and Regulations

Section 1105(d)(i) of the Tax Law provides for the imposition of sales tax, in part, on:

The receipts from every sale of beer, wine or other alcoholic beverage or any other drink of any nature, or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(3) in those instances where the sale is made through a vending machine that is activated by use of coin, currency, credit card or debit card (except the sale of drinks in a heated state made through such a vending machine) or is for consumption

off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

Section 527.8 of the Sales and Use Tax Regulations provides, in part:

(a) Imposition. Sales tax is imposed on the receipts, including any cover, minimum, entertainment or other charge, from every sale of beer, wine or other alcoholic beverages and food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers:

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the sale is for consumption off the premises and the vendor (or someone acting on behalf of the vendor) after delivery either serves or assists in serving, cooks, heats or provides services with respect to the food or drink; and

(3) in those instances where the sale is for consumption off the premises of the vendor all sandwiches and other food or drink unless the food or drink is sold in:

(i) an unheated state; and

(ii) the same form and condition, quantities and packaging commonly used by food stores not principally engaged in selling foods prepared and ready to be eaten.

* * *

(e) Consumption off premises. The phrase for consumption off the premises shall mean that the food, including sandwiches, or drink is intended to be consumed at a place away from the vendor's premises.

(1) Food or drink in a heated or unheated state. The determination of when food or drink is sold either in a heated or unheated state must be made according to the vendor's method of merchandising.

(i) If the vendor attempts to maintain the food at a temperature which is warmer than the surrounding air temperature by using heating lamps, warming trays, ovens or similar units, or cooks to order, the vendor is selling food in a heated state.

(ii) If the vendor sells prepared foods from units maintained at or below surrounding air temperature, such sales are sales of prepared food in an unheated state.

* * *

(2) Form, condition, quantity and packaging sold in food stores.

(i) The term food stores shall mean any establishment which is principally engaged in selling food or drink which is not prepared and ready to be eaten. Supermarkets, grocery stores, fish markets, produce markets, bakeries and meat markets are examples of the types of establishments considered to be food stores. When a department within food stores makes sales of food or drink which are subject to tax, it must collect the tax.

(ii) Food sold in an unheated state is taxable when sold as sandwiches or meals ready to be eaten when arranged on plates or platters as individual or multiple servings regardless of how the sales price is arrived at (pound v. serving).

(iii) Food sold in an unheated state is not subject to tax when commonly sold in food stores in bulk by weight by the dozen (or part thereof) or by volume (gallon, quart, etc.) for off-premises consumption.

(iv) Sales of heated and unheated food in combination on plates or as dinners are subject to tax on the total charge.

* * *

Example 5: Sandwiches sold through vending machines or other establishments are taxable in all instances.

* * *

(i) Resale. (1) Any person purchasing food or drink for resale as such is required to pay tax thereon at the time of purchase.

TSB-A-01(18)S
Sales Tax
May 24, 2001

(2) When the food or drink is subsequently resold, the seller is required to collect tax from the purchaser.

(3) The tax paid by the seller may be taken as a credit against the tax which the seller is required to collect and remit on the subsequent sale. The credit is limited to the amount of tax actually paid on the purchase by the seller of the food and drink resold.

Opinion

The food sold by the Petitioner to bars consists of items such as uncooked frozen personal size pizzas and cold cut, eggplant and meatball hero sandwiches. Pursuant to Section 1105(d)(i) of the Tax Law, food sold in an unheated state and of a type commonly sold for consumption off the premises and in the same form and condition, quantities, and packaging by food stores, is not subject to sales tax. The uncooked frozen personal size pizzas sold by Petitioner would constitute a type of food commonly sold by a food store. Therefore, the sale by Petitioner of the uncooked frozen pizzas will not be subject to sales tax. However, Section 1105(d)(i) of the Tax Law provides for the imposition of sales tax on the sale of sandwiches in all instances, including sales for resale. See Section 527.8(i) of the Sales and Use Tax Regulations. Accordingly, Petitioner's sales of cold cut, eggplant and meatball hero sandwiches will be subject to sales tax.

It is noted that the sales tax paid by a bar on the purchase of the sandwiches may be taken as a credit on its return when it remits the tax collected on the subsequent sale of the sandwiches. See Section 527.8(i) of the Sales and Use Tax Regulations.

DATED: May 24, 2001

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.