

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S151029B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). The Petitioner sells cookies through retail stores in New York. The cookies are baked at the stores and kept warm while displayed at the counters and are delivered to customers in a heated state. Petitioner asks whether its cookie sales are taxable pursuant to Tax Law § 1105(d)(i).

We conclude that Petitioner’s sales are taxable under Tax Law § 1105(d)(i) since Petitioner sells the cookies in a heated state.

**Facts**

Petitioner is in the business of selling cookies. Petitioner’s business model is focused on selling warm cookies to customers. The cookies are baked at Petitioner’s stores and kept warm while displayed at the counters. Cookies purchased for delivery are kept warm in heat sleeves until delivered to customers.

Petitioner sells cookies to three different types of customers: (i) customers who purchase a few cookies usually for immediate consumption; (ii) customers who purchase cookies in to-go boxes, usually from four to a few dozen cookies at a time; and (iii) customers who order cookies to be delivered by Petitioner.

**Analysis**

Tax Law § 1105(d)(i) provides that a sales tax shall be imposed on: The receipts from ..... every sale of food and drink of any nature or of food alone, when 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;

\* \* \*

(3) in those instances where the sale is made .....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 further clarification of the above section of the Tax Law as follows:

(d) *Consumption on premises.* The phrase *for consumption on the premises* shall mean that the food or drink sold may be consumed on the premises where the vendor conducts his business.

(e) *Consumption off premises.*

(1) 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.

(2) 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.

Petitioner's business model is focused on selling warm cookies to customers. Whether Petitioner sells cookies in small quantities in its stores, in larger quantities in to-go boxes or delivers cookies to customers, the cookies are always sold in a heated state. Thus, pursuant to Tax Law § 1105(d) and 20 NYCRR § 527.8, Petitioner's receipts from the sales of cookies are taxable, whether sold for on-premises or off-premises consumption.

DATED: April 27, 2016

\_\_\_\_\_  
DEBORAH R. LIEBMAN  
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the

person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.