

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-20(50)S
Sales Tax
October 27, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] “(Petitioner”). Petitioner asks whether its sales of individual 8-ounce yogurt cups while maintaining in-store and outside seating at its stores are subject to sales tax.

We conclude that Petitioner's sales of individual 8-ounce yogurt cups in its stores are not subject to New York State and local sales taxes when sold for off-premises consumption. If Petitioner sells the product for on-premises consumption, the product would be subject to New York State and local sales taxes.

Facts

Petitioner is a convenience store chain with numerous locations throughout New York State. These locations have both indoor and outdoor seating for customers. The indoor seating typically consists of 3-4 booths and the outdoor seating typically consists of 2 picnic tables. Petitioner locates the individual 8-ounce yogurt cups (“product”) that it sells in both open face coolers in the front of its stores and in closed coolers in the rear of its stores. The product is sold in an individual serving size container from which the customer can directly consume its contents. In all instances the product is covered with a lid so that the customer may consume its contents off-premises. Petitioner states that the yogurt cups are identical to those sold in grocery stores.

Analysis

Receipts from the retail sales of food, food products, beverages, dietary foods and health supplements, sold for human consumption, generally are exempt from New York State sales and use taxes imposed under Tax Law § 1105(a) on the retail sale of tangible personal property. *See* Tax Law § 1115(a). Accordingly, yogurt cups of the kind Petitioner sells generally are exempt from sales taxes. *See* TB-ST-525; TB-ST-283; TB-ST-135. However, Tax Law § 1105(d)(i)(1) provides that sales of food or drink are taxable in all instances where the sale is for consumption on the premises where sold. Consumption on the premises means that “the food or drink sold may be consumed on the premises where the vendor conducts its business,” while off-premises consumption means the food “is intended to be consumed at a place away from the vendor's premises.” *See* 20 NYCRR 527.8(d)(e). In addition, Tax Law § 1105(d)(i)(3) provides that sales of food or drink are taxable in those instances where the sale is for consumption off the premises of the vendor unless the food or drink (other than sandwiches) is sold in an unheated state, and is of a type commonly sold for consumption off the premises and in the same form and

condition, quantities and packaging in establishments that are food stores, other than those principally engaged in selling foods prepared and ready to be eaten.

Petitioner states that it provides tables and chairs for its customers to eat prepared foods on-premises. However, the mere presence of tables and chairs does not make all its sales taxable. Similarly, the placement of the product in an open cooler in front of the store or in a closed cooler in the rear of the store does not determine whether the product is subject to tax. Rather, because Petitioner's product is sold in an unheated state and in the same form and condition, quantities and packaging as in grocery stores, we conclude that the yogurt cups are not subject to New York State and local sales taxes if sold for off-premises consumption. *See* Tax Law § 1105(d)(i)(3); TB-ST-135. If Petitioner sells the yogurt cups for on-premises consumption, they would be subject to sales tax.

DATED: October 27, 2020

/S/

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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.