

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

TSB-A-04(28)S
Sales Tax
December 14, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040323A

On March 23, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Michael A. Tomaselli, Italian Salumeria Deli, 421-423 James St., Utica, NY 13501. Petitioner, Michael A. Tomaselli, Italian Salumeria Deli, furnished additional information with respect to the Petition on April 6, 2004.

The issue raised by Petitioner is whether the sale of a food product locally marketed as tomato pie is subject to sales tax.

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

Petitioner sells a product locally known as tomato pie. Petitioner describes a tomato pie as a food product baked in a bread oven with bread dough and tomatoes. Tomato pie is a product which the New York State Department of Agriculture & Markets deems not necessary to be kept or served at a "holding temperature." Tomato pies are intended to be consumed cold or at room temperature. Petitioner does not make sales for on premises consumption. Petitioner may sell tomato pies by the slice. The tomato pie slices are wrapped in paper and are then packaged in a bag or box for off premises consumption.

Applicable law and regulations

Section 1105(a) of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax. . . .upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

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 beverages or any other drink of any nature, or 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, 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 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form. The food and drink excluded from the exemption provided by this paragraph under subparagraphs (i), (ii) and (iii) of this paragraph shall be exempt under this paragraph when sold for seventy-five cents or less through any vending machine activated by the use of coin, currency, credit card or debit card. With the exception of the provision in this paragraph providing for an exemption for certain food or drink sold for seventy-five cents or less through vending machines, nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

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 3: Cold cuts, salads and bakery products are sold by a restaurant for home consumption. The restaurant charges its customer by the pound for the cold cuts and salad and by the dozen or loaf for the bakery products. Such sales are not taxable.

Opinion

Petitioner sells a product known as tomato pie. The New York State Department of Agriculture & Markets does not deem it necessary for tomato pies to be kept or served at a "holding temperature." Tomato pies are made with bread dough and tomatoes, and are intended to be consumed cold or at room temperature. Petitioner does not make sales for on premises consumption. Petitioner also sells tomato pies by the slice. Purchases by the slice are delivered to customers in a bag, or in a box for purchases of more than one slice, for off premises consumption.

Petitioner's description of the sales and packaging of its product indicates that Petitioner's sales practices are similar to those of food stores other than restaurants or other establishments principally engaged in selling foods prepared and ready to be eaten. Petitioner states it is not otherwise an establishment (diner, luncheonette, sandwich bar, etc.) engaged in the sale of food or drink for on premises consumption. Petitioner's sales of tomato pie in an unheated state, and in the same form and condition, quantities and packaging as items of this type are commonly sold in food stores other than those principally engaged in selling foods prepared and ready to be eaten (i.e., in a bag or box as described in this Advisory Opinion), for off premises consumption are not subject to sales tax under section 1105(d) of the Tax Law. See

section 527.8 of the Sales and Use Tax Regulations. Such sales of tomato pie are sales of baked goods exempt from tax under section 1115(a)(1) of the Tax Law.

DATED: December 14, 2004

/s/
Jonathan Pessen
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Technical Services Division

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