

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

TSB-A-05(12)S
Sales Tax
April 27, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030912C

On September 12, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Costco Wholesale Corporation, 999 Lake Drive, Issaquah, WA 98027.

The issue raised by Petitioner, Costco Wholesale Corporation, is whether the sale of a box of 12 frozen chicken sandwiches is subject to State and local sales taxes.

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

Petitioner operates a chain of cash and carry membership warehouses in 36 states and has 14 locations in New York State. Petitioner's operations are based on the concept that offering very low prices on a limited selection of national brand products, over a wide range of merchandise categories, will produce rapid inventory turnover and high sales volume. Petitioner sells a variety of merchandise, including food, candy, tobacco, sundries, appliances, electronics, tools, office supplies, and other items. Petitioner services both retail and wholesale markets from its selling locations, which are referred to as "warehouses." Almost all of Petitioner's sales are cash and carry with the purchaser taking possession of the merchandise in the store at Petitioner's cash registers.

One of the products currently sold by Petitioner is a box of 12 individually wrapped, fully cooked, frozen chicken sandwiches. The sandwich consists of an enriched bun and a charbroiled chicken breast patty. Each sandwich is then placed in a sealed plastic bag. The sandwiches are contained within a box with plastic wrap enclosing the box. The box of sandwiches is received in a frozen state and sold in the frozen foods section of Petitioner's store.

The packaging states "keep frozen or refrigerated." This item is sold in the same freezer case as chicken potpies and other frozen foods. Petitioner does not prepare, produce, manufacture, or assemble this item in any way. This item is purchased from an unrelated company. The item is not altered in any fashion. Pallets of the product, as received from Petitioner's vendor, are displayed in the freezer case for sale. A purchaser would be unable to consume the item on premises even if he or she wanted to since there are no facilities provided to defrost or reheat the item.

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 beverage 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;

* * *

(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:

* * *

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

* * *

(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.

* * *

(2)(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).

Opinion

Petitioner sells a variety of merchandise, including food. One of the food products Petitioner sells is a box which contains 12 frozen, fully cooked, individually wrapped, chicken sandwiches.

Section 1115(a)(1) of the Tax Law provides an exemption for retail sales of food and beverages sold for human consumption. However, the exemption provided in section 1115(a) does not apply to sales of food and drink in or by restaurants, taverns and other establishments

subject to the tax imposed by section 1105(d) of the Tax Law. The tax imposed by section 1105(d) on sales of food and drink in restaurants, taverns and other establishments applies to all sales for on premises consumption. Section 1105(d)(i)(3) also provides that sales by restaurants, taverns and other establishments of food, other than sandwiches, or drink in an unheated state, for off-premises consumption, are not subject to tax where they are of a type commonly sold for off premises consumption and in the same form and condition, quantities and packaging as in establishments which are food stores.

The box of individually wrapped frozen chicken sandwiches sold by Petitioner is not subject to the tax imposed under section 1105(d) of the Tax Law. This frozen food product is not sold for on premises consumption as it clearly cannot be consumed on Petitioner's premises in its frozen condition and there are no facilities, such as microwave ovens, to prepare such food for ready consumption on Petitioner's premises. The language in section 1105(d)(i)(3) respecting sandwiches was intended to ensure that the sale of sandwiches which are ready to be eaten would be subject to tax under section 1105(d). This language was not intended to tax frozen sandwiches of the kind sold by Petitioner in this case, which are unable to be consumed in a frozen condition. The frozen chicken sandwiches are of a type commonly sold for off premises consumption and are in the same form and condition, quantities and packaging as in establishments which are food stores. Thus, the frozen chicken sandwiches sold by Petitioner in this case are exempt from sales tax since they are food sold for human consumption as described in section 1115(a)(1) of the Tax Law and are not food subject to the imposition of the section 1105(d) tax.

DATED: April 27, 2005

/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.