

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-H-81(45)S
Sales Tax
March 4, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S801121D

On November 21, 1980, a Petition for Advisory Opinion was received from Mr, John P. Hoban (The Donut Man), P.O. Box 28, Cross Street, Pulteney, New York 14874.

The issue raised is whether or not receipts from the sale of doughnuts sold in packages containing 8-12 doughnuts are subject to the sales tax imposed under Article 28 of the Tax Law.

Petitioner owns and operates a business known as "The Donut Man" which produces and sells doughnuts in packages containing 8-12 doughnuts. The business is located in a 7' x 8' trailer which is moved from one area to another depending on the market available for the product. There are no provisions for on premises consumption.

Section 1105(d) of the Tax Law, contained in Article 28, imposes a tax 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. . . in those instances where the sale 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."

Inasmuch as the Petitioner (1) sells his product for off-premise consumption, (2) sells his product in an unheated state and (3) sells a product "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," the receipts from Petitioner's sales are not subject to the sales tax imposed on the sale of food under Article 28 of the Tax Law.

DATED: February 18, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR