

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(13)S
Sales Tax
March 18, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070612A

On June 12, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Sales Tax Solutions and Consulting, 786 Lee Avenue, North Tonawanda, New York 14120.

The issue raised by Petitioner, Sales Tax Solutions and Consulting, is whether sales of frozen dinners to clients and the public by a dietician are subject to sales tax.

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

A certified dietician prepares and sells frozen dinners to clients and the general public through a retail style freezer case located in a common area at the dietician's place of business. The dinners are pre-made (not made to order) and are sold in a frozen state (not heated or ready to eat). Dinners are sold in single, double, and family size portions. The frozen dinners are displayed for sale in the dietician's common area. No seating or other accommodations are provided, and there are no facilities in which the frozen dinners can be thawed, cooked, or heated on premises. Only a limited variety of frozen dinners are offered for sale.

The frozen dinners are prepared in a commercial kitchen rented by the dietician and packaged according to appropriate standards. Once prepared, the dinners are packaged and placed in the freezer in the common area. A small inventory of frozen dinners is maintained in a second freezer not located in the common area. This inventory is maintained and additional dinners are prepared according to supply and demand as well as spoilage. The dietician maintains all health code certificates and permits regarding the kitchen and food preparation.

Applicable law and regulations

Section 1105(d) of the Tax Law imposes the tax, in part, on the following:

(i) 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, 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 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 of the Tax Law provides, in part:

(a) 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 528.2(a) of the Sales and Use Tax Regulations provides, in part:

Food and food products. (1) Food and food products, except candy and confectionery, when sold for human consumption, are exempt from sales and compensating use tax. . . .

(2) The terms *food* and *food products* as used in this section mean edible commodities whether prepared, processed, cooked, raw, canned or in any other form, which are generally regarded as food. This category includes, but is not limited to:

meat and meat products	fats, oils and shortenings
milk products	condiments
cereals and grain products	spices
baked goods	sweetening agents
vegetables and vegetable products	food preservatives
fruits and fruit products	food coloring
poultry	frozen dinners
fish and seafood	snacks(except candy and confections)
frozen entrees and desserts	
jellying agents	

Opinion

A dietician prepares and sells frozen dinners to clients and the general public through a retail style freezer case. The dinners are not made to order and are sold in a frozen state. Customers may view and purchase the frozen dinners in the dietician's common area. There is no seating or accommodations where customers can eat the frozen dinner and there are no facilities in which the frozen dinners can be thawed, cooked, or heated on premises.

The description provided of the packaging and sale of the frozen dinners indicates that the dietician'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. Pursuant to section 1105(d)(i) of the Tax Law, food sold in an unheated state and of a type commonly sold for consumption off the premises and in the same form and condition, quantities, and packaging by food stores other than those principally engaged in selling foods prepared and ready to be eaten, is not subject to sales tax under section 1105(d) of the Tax Law. Frozen dinners in the same form and condition, quantities and packaging as sold by the dietician in the present case are commonly sold in food stores other than those principally engaged in selling foods prepared and ready to be eaten. The frozen dinners in this case are sold for consumption off the dietician's premises. Accordingly, the dietician's sales of frozen dinners in this case are not subject to sales tax under section 1105(d). Section 528.2(a)(2) of the Sales and Use Tax Regulations includes frozen dinners in the category of food and food products exempted by section 1115(a)(1) of the Tax Law from the sales tax imposed by section 1105(a) of the Tax Law. Therefore, the sale by the dietician of frozen dinners as described in this Advisory Opinion are not subject to sales tax.

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See *Jo Ann Narducci, d/b/a D & V Foods*, Adv Op Comm T & F, May 24, 2001, TSB-A-01(18)S.

DATED: March 18, 2008

/s/
Jonathan Pessen
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Taxpayer Guidance Division

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.