

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 the sale of pre-packaged baked goods sold to New York residents is subject to New York sales and use tax. Petitioner also asks if it is required to file sales tax returns if it sells food products that are exempt from tax.¹

We conclude, based on the facts provided, that such pre-packaged food products generally are not subject to sales tax. However, those products sold in keepsake tins are subject to sales tax. Also, persons required to register for sales tax in New York State must file a sales tax return even if there are no taxable sales.

Facts

Petitioner is an out-of-state bakery that manufactures and sells food for human consumption. Petitioner only sells fully cooked baked goods, specifically brownies, cookies and bars in various sizes and flavors. All products are individually wrapped and labeled and sold in a non-heated state. Petitioner does not have eating facilities and does not sell its baked goods for on-premises consumption. Petitioner accepts orders via its own website, through Amazon or through telephonic ordering. Once ordered, the products are packaged in non-returnable containers and shipped to the customer or its designee via a common carrier. Customers can purchase brownies in a cardboard box or, for an additional charge of \$20, purchase brownies in a keepsake tin. Petitioner advises that it made at least \$500,000.00 in sales in 2021.

Analysis

Tax Law § 1105(a) imposes sales tax on retail sales of tangible personal property unless an exemption applies. Food sold for human consumption, not including candy and confectionaries, is exempt from tax. See Tax Law § 1115(a)(1). The category of candy and confectionaries does not include baked goods, such as cupcakes, cookies, pretzels, donuts and pastries or any similar products, such as granola or cereal bars. See TB-ST-103 and 20 NYCRR 528.2(a). Therefore, the retail sale of baked goods, specifically brownies, cookies, and bars, is not subject to sales tax under Tax Law § 1105(a).

¹ Petitioner also asks whether it is a vendor (*i.e.* has nexus with New York), which would require it to register for sales tax purposes and collect and remit State and local sales tax. However, because nexus questions are fact dependent, they are not addressed in Advisory Opinions and, therefore, we provide no opinion on this issue.

Tax Law § 1105(d)(i) imposes sales tax on the sale of food, other than for resale, when sold by restaurants, taverns or similar establishments or through vending machines. Petitioner does not provide eating facilities or sell its products through vending machines. Rather, its products are ordered online or by telephone and shipped in an unheated state to customers or their designees. Therefore, Petitioner's sales are not subject to tax pursuant to Tax Law § 1105(d)(i), because Petitioner is not a restaurant, tavern, or similar establishment.

However, if the baked goods are sold with other tangible personal property, such as a gift basket, for a single charge, the entire receipt is subject to sales tax unless the other tangible personal property is a *de minimis* element of the sale. See TSB-A-09(54)S. In this case, the additional purchase price of \$20 for a keepsake tin is not *de minimis* to the total sale price of the entire package. Therefore, Petitioner must collect sales tax on the sale of the entire package of brownies delivered in a keepsake tin. See TSB-A-09(54)S; TSB-A-02(34)S; 20 NYCRR 527.1(b).

The Tax Law defines "vendor" to include "A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution." See Section 1101(b)(8)(i)(E).

Furthermore, "...a person shall be presumed to be regularly or systematically soliciting business in this state if, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, the cumulative total of such person's gross receipts from sales of property delivered in this state exceeds five hundred thousand dollars and such person made more than one hundred sales of property delivered in this state, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to have gross receipts in excess of five hundred thousand dollars or more than one hundred sales of property delivered in this state for the next succeeding four quarterly periods ending on the last day of February, May, August and November." See Tax Law § 1101(b)(8)(ii)(B)(iv).

Petitioner advised that the sale of baked goods exceeded \$500,000.00 in 2021. If Petitioner also made more than one hundred sales of property delivered in the state, it may be considered a vendor for sales tax purposes.

Furthermore, since Petitioner makes taxable sales in the state, if it has nexus with New York, and is considered a vendor, it must register as a vendor and timely file sales and use tax returns even if there is no tax due for the filing period. See PUB-750, *A Guide to Sales Tax in New York State* (11/15).

DATED: August 2, 2024

/s/

MARY ELLEN LADOUCEUR
Principal Attorney

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.