

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

TSB-A-85(60)S
Sales Tax
December 4, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S841115B

On November 15, 1984, a Petition for Advisory Opinion was received from Robert H. Matheis DBA Pizza Oven Baking Co., 54 Vine Street, Lockport, New York 14094.

The issue raised is whether Petitioner's pizza, sold in an unheated state for off premise consumption, is subject to the Sales and Use Tax imposed under Article 28 of the Tax Law.

Petitioner is a pizza vendor and sells both ordered and unordered pizza. The food is only sold for consumption off the premises. After baking, the pizza is not maintained in a heated state. Petitioner states that this unheated pizza is a speciality and is the same as unheated pizza sold in some bakeries. Petitioner sells this unheated pizza by the slice and as whole pizzas.

Section 1105(d)(i) of the Tax Law 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, . . . (3) 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."

Petitioner states in his petition that his product is sold solely in an unheated state for off premises consumption. Thus the issue turns on whether this pizza is of a type commonly sold for off premises consumption in the same form, condition, quantity and packaging as in food stores other than those principally engaged in selling foods prepared and ready to be eaten.

Regulations define a food store as "any establishment which is principally engaged in selling food or drink which is not prepared and ready to be eaten." Examples of food stores include supermarkets, grocery stores, fish markets, produce markets, bakeries and meat markets. Regulations state that "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." (20 NYCRR 527.8(e)(2)(i) and (iii)).

Accordingly, if Petitioner can establish that the unheated pizza sold in his establishment for off premises consumption is of a type commonly sold for consumption off the premises and in the same form and condition, quantity and packaging in food stores such as bakeries, then such unheated pizza will not be subject to tax. It should be noted that since Petitioner sells unheated pizza by the slice and by the whole pizza, Petitioner must establish each method's qualification for exemption separately.

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In order to establish that such pizza is commonly sold in food stores, Petitioner must establish that the pizza is regularly sold in a large number of food stores. The fact that one or a few food stores sell such pizza does not establish that such pizza is commonly sold by food stores.

Finally, whenever pizza, whole or in portions, is kept hot (i.e. warmer than the surrounding air temperature) or reheated for pick-up, the sale of such food by any establishment is a taxable transaction.

DATED: November 4, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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