

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

TSB-A-98(38)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971209D

On December 9, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Price Chopper Operating Co., Inc., P.O. Box 1074, Schenectady, New York 12301.

The issue raised by Petitioner, Price Chopper Operating Co., Inc., is whether sales of sushi and related items are subject to sales tax when sold from a sushi counter/bar within a grocery store.

Petitioner submits the following facts as the basis for this advisory opinion.

Petitioner recently opened a sushi bar within one of its New York supermarkets. The area of the store where the sushi bar is located does not provide seating for the purchases to be eaten in the store. The items sold at the sushi bar are sold in an unheated state. All items sold are either prepackaged or are packaged at the counter upon request of the customer. Petitioner included with its Petition a copy of the menu of the sushi bar which identifies the items on the menu as "Ready to eat Meals." The menu lists a fixed price for each item. The items are not sold by weight. The items that Petitioner sells at the sushi bar are sold as a pack or platter at various prices ranging from \$3.00 for certain 2 item orders up to \$59.95 for the Jumbo Sushi Platter.

Applicable Law and Regulations

Section 1105(d)(i) of the Tax Law imposes a tax upon:

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...

(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 the 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 food prepared and ready to be eaten.

Section 527.8(e)(2) of the Sales and Use Tax Regulations, provides, in part:

(2) Form, condition, quantity and packaging sold in food stores.

(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).

(iii) 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.

Opinion

The items that Petitioner sells at the sushi bar are sold as a pack or platter at various prices ranging from \$3.00 for certain 2 item orders up to \$59.95 for the Jumbo Sushi Platter. The items on the menu are of the type that are commonly sold for consumption on the premises of a restaurant. It does not appear that the items on the menu are of the type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging as sold in food stores such as supermarkets, grocery stores and fish markets. Thus, the items sold at the sushi bar are subject to sales tax pursuant to Section 1105(d)(i)(3) of the Tax Law and Section 527.8(e)(2) of the Sales and Use Tax Regulations.

DATED: June 2, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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