

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

TSB-A-86(19)S  
Sales Tax  
May 15, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S860124A

On January 24, 1986 a Petition for Advisory was received from Joseph O. Cobb d/b/a Cobbs House of Meats, 1758 Rte 9, Clifton Park, New York 12065.

The issue is whether Petitioner's sale of certain prepared foods are subject to tax.

Petitioner sells baked stuffed potatoes that are prepared and frozen; quiche made on the premises but not sold hot; prepared foods such as T.V. dinners made on premises that are not sold hot; cold soups that may be heated at home; stir-fry style foods not sold hot; cold salads, cold cut platters, cheese platters, vegetable and fruit platters.

Section 1105(d) of the Tax Law imposes a tax on the receipts from "... every sale of food and drink ... when sold in or by restaurants, taverns or other establishments ....

\* \* \*

(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."

Sales and Use Tax Regulation Section 527.8 further explains the above section of the Tax Law as follows:

"(d) Consumption on premises. The phrase 'for consumption on the premises' shall mean that the food or drink sold may be consumed on the premises where the vendor conducts his business.

(e) Consumption off premises. The phrase 'for consumption off the premises' shall mean that the food, including sandwiches, or drink is intended to be consumed at a place away from the vendor's premises.

(1) Food or drink in a heated or unheated state. The determination of when food or drink is sold either in a heated or unheated state must be made according to the vendor's method of merchandising.

(i) If the vendor attempts to maintain the food at a temperature which is warmer than the surrounding air temperature by using heating lamps, warming trays,

ovens or similar units, or cooks to order, the vendor is selling food in a heated state.

(ii) If the vendor sells prepared foods from units maintained at or below surrounding air temperature, such sales are sales of prepared food in an unheated state.

Example 1: A supermarket sells barbecued chicken hot from a rotisserie to be taken home and eaten. This is a taxable sale of heated food.

Example 2: A food store sells potato salad by the pound and also sells hot pastrami by the pound for home consumption. The potato salad is not taxable but the pastrami is subject to tax.

(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.

(iv) Sales of heated and unheated food in combination on plates or as dinners are subject to tax on the total charge.

Example 3: Cold cuts, salads and bakery products are sold by a restaurant for home consumption. The restaurant charges its customer by the pound for the cold cuts and salad and by the dozen or loaf for the bakery products. Such sales are not taxable.

Example 4: A supermarket sells and arranges cold cuts on platters for customers. The customer is charged by the pound for the cold cuts. Sales of this type are taxable.

Example 5: Sandwiches sold through vending machines or other establishments are taxable in all instances.

Example 6: A take-out establishment sells 10 pieces of chicken, 6 rolls and 1 pound of potato salad as a meal for three persons and charges one price for the package. A sale of this type is taxable in full.

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Accordingly, Petitioner's baked potatoes, quiche, T.V. dinners, soup, stir-fry foods and salads will be exempt from the sales and use tax only if Petitioner is able to establish for each of these items that:

- 1) they are sold for off premises consumption as defined in regulation section 527.8(e);
- 2) they are sold in an unheated state as defined in regulation section 527.8(e)(1);
- 3) they are of a type commonly sold for off premises consumption by food stores as defined in regulation section 527.8(e)(2); and
- 4) they are sold in the same form and condition, quantities and packaging as such food stores.

This question is necessarily a question of fact which cannot be answered within the context of an Advisory Opinion inasmuch as the Advisory Opinion function is limited to setting forth the applicability of pertinent statutory and regulatory provisions to a specified set of facts. It must be emphasized that the taxability of food items depends not only on what is sold but how they are sold, i.e. their quantities and packaging.

However, receipts from the sales of cold cut platters, cheese platters, vegetable platters and fruit platters are subject to tax inasmuch as they come within the provisions of regulation section 527.8(e)(2)(ii) and Example 4 of regulation section 527.8(e)(2)(iv).

DATED: May 15, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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