

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

TSB-A-92 (25)S
Sales Tax
March 19, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S911216A

On December 16, 1991, a Petition for Advisory Opinion was received from Great Bons, Inc., 72 West Lane, Bayshore, New York 11779.

The issue raised by Petitioner, Great Bons, Inc., is whether the sale of certain food and beverages in stores located in shopping malls in which food courts may or may not be present are subject to sales and use taxes.

Petitioner owns and operates several "Cinnabons" stores. "Cinnabons" is a national franchise which sells baked cinnamon rolls, coffee, bottled water, juice, milk and soft drinks in stores generally located in shopping malls.

Petitioner presently operates in shopping malls which have "food courts" located within the mall. Petitioner does not have any stores located in the "food courts," nor does Petitioner pay any food court common area charges. Petitioner also plans to open stores in shopping malls which have no "food courts."

Petitioner has stores in which tables are available for customers to eat at, as well as stores which have no tables or any other facilities for customers to eat.

Petitioner sells fresh baked cinnamon rolls (kept warm), pre-package boxes of cinnamon rolls (kept refrigerated), milk, juice, bottled water, soft drinks, and cups of coffee. Items are either sold separately or in conjunction with each other, with the exception of milk and juice which are not sold in conjunction with other items. Moreover, the milk and juice are sold in cartons which are in the same form as that sold by food stores which are not principally engaged in selling food prepared and ready to be eaten.

When a customer purchases any item for on premise consumption, the cinnamon roll is placed on a plate. If a customer purchases an item for off premise consumption, the items are placed in a bag or in a to go carry box. Prepackaged cinnamon rolls are sold only for off premise consumption.

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. . . .

(1) in all instances where the sale is for consumption on the premises where sold;

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(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 527.8 of the Sales and Use Tax Regulations further explains, in pertinent part, 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 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.

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

Section 1115(a)(2) of the Tax Law exempts from sales tax the receipts from the sale of water, when delivered to the consumer through mains or pipes.

Department of Taxation and Finance Notice ST-151.9 (6/71) and Notice ST-151.9 (3/73 Supplement), relating to the sale of food or drink for on or off premises consumption, provides, in part, that natural fruit juices and milk will not be taxable when they are of the same type, and are sold in the same form, condition, quantities and packaging as they are commonly sold in grocery stores. However, all beverages sold by cup are subject to tax.

Accordingly, pursuant to Sections 1105(d) and 1115(a)(2) of the Tax Law, Section 527.8 of the Sales and Use Tax Regulations, Notice ST-151.9 (6/71) and Notice ST-151.9 (3/73 Supplement) the receipts from the sale of fresh baked cinnamon rolls in a heated state, bottled water, soft drinks and cups of coffee are subject to sales and use taxes whether sold for on or off premises consumption.

Pursuant to Section 1105(d) of the Tax Law and Section 527.8 of the Sales and Use Tax Regulations the receipts from the sale of pre-packaged boxes of cinnamon rolls in an unheated state which are in the same form, condition, quantity and packaging as rolls sold in a food store are not subject to sales and use taxes provided that they are not sold for on premises consumption.

The receipts from the sale of cartons of milk and juice, for off premises consumption, are not subject to sales and use taxes pursuant to Section 1105(d) of the Tax Law, Section 527.8 of the Sales and Use Tax Regulations, Notice ST-151.9 (6/71) and Notice ST-151.9 (3/73 Supplement) since they are sold in the same form as that sold by food stores which are not principally engaged in selling food prepared and ready to be eaten. However, where said cartons of milk and juice are sold for on premises consumption in stores in which Petitioner has tables for customers to eat at, the receipts from the sale of such items are subject to sales tax. The sale of said items will not be considered to be sold for on premises consumption in those malls having food courts where Petitioner's store is not located in the mall food court area, Petitioner is not liable for food court common charges and Petitioner does not have facilities for the customer to eat at in its store.

DATED: March 19, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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