

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(7)S
Sales Tax
February 23, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S091112A

On November 12, 2009, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its sales of sandwiches are subject to sales tax. Petitioner's receipts from the sale of sandwiches are not subject to sales tax. Petitioner is selling tangible personal property that is not subject to tax.

Facts

Petitioner manufactures and sells prepared food products, primarily sandwiches, to convenience stores located in New York, New Jersey, and Pennsylvania. In addition to selling the sandwiches for off-premises consumption, these stores sell grocery items such as milk, eggs, coffee, cereal, bread, and beer.

Petitioner's sandwiches are prepared and packaged at a manufacturing facility owned by Petitioner. Petitioner purchases the raw ingredients used to prepare the sandwiches. Petitioner does not provide catering services. It simply manufactures sandwiches and sells them to convenience stores.

Analysis

Tax Law section 1105(a) imposes sales tax on the receipts from the sale of tangible personal property. Section 1105(d)(i)(3) of the Tax Law imposes sales tax on the receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or 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 New York, or by caterers, in those instances where the sale is made 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. What distinguishes Petitioner from a restaurant or other establishment whose receipts are subject to sales tax under Tax Law section 1105(d) is that Petitioner manufactures sandwiches exclusively for sale at wholesale to convenience stores. Since sandwiches are subject to sales tax under Tax Law section 1105(d) only when sold by a restaurant or other establishment, Petitioner's sales of sandwiches are not subject to tax under section 1105(d). Petitioner is selling tangible personal property that is not subject to sales tax.

