

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>TODD A. NEUPERT</b>	:	DETERMINATION DTA NO. 830368
for Revision of a Determination or for Refund of Sales and : Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2017 through November 30, 2019.	:	

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Petitioner, Todd A. Neupert, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2017 through November 30, 2019.

A videoconferencing hearing via CISCO Webex was held before Donna M. Gardiner, Administrative Law Judge, on January 24, 2023, with the final brief to be submitted by May 18, 2023, which date commenced the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel).

***ISSUE***

Whether petitioner is liable for sales tax on the sale of party platters pursuant to Tax Law § 1105 (d).

***FINDINGS OF FACT***

1. Petitioner, Todd A. Neupert, is the owner of the Tailgate Deli located in Buffalo, New York. As such, he is a responsible person required to collect and pay any sales tax due on behalf of the business and his status as a responsible person is not at issue.

2. During the period March 1, 2017 through November 30, 2019 (audit period), the Tailgate Deli sold a variety of prepared foods as well as deli meat and other non-prepared foods.

3. Petitioner's business was selected for audit by the Division of Taxation's (Division's) Buffalo District Office. Petitioner was found to have adequate records in order to conduct a detailed audit.

4. The auditor determined that petitioner failed to charge sales tax on party platters that were sold at the Tailgate Deli.

5. On May 27, 2020, the Division issued a notice of determination, bearing assessment number L-051451421, to petitioner for sales tax due in the amount of \$12,579.62, plus interest for the audit period (notice). No penalties were imposed.

6. In protest of the notice, petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held by telephone on November 18, 2020. Thereafter, a conciliation order, CMS No. 000322270, dated January 8, 2021, was issued to petitioner that denied his request and sustained the notice.

7. On March 23, 2021, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

8. The sole issue in this matter is whether party platters sold by the Tailgate Deli are considered prepared foods. The party platters at issue are referred to as catering platters on the menu and consist of a choice of three meats and three cheeses. The meats and cheeses are served on a deli tray with rolls, mayonnaise, mustard, oil, lettuce, tomatoes, onions and banana peppers. The Tailgate Deli offers four sizes of catering platters on its menu: mini, small, medium and large.

9. Petitioner submitted into evidence a photograph depicting the party platters sold by the Tailgate Deli. The meats and cheeses are pre-sliced and are arranged in a circle in the middle of the tray. The outer ring of the deli tray consists of individual containers that include the various condiments and sliced sandwich toppings. The rolls are in a separate bag and accompany the party platters. Depending on the size of the platters, the number of rolls included are 24 rolls for a mini tray, 36 rolls for a small tray, 48 rolls for a medium tray and 60 rolls for a large tray. The customer is charged one price based upon the size of the platter.

10. At some point, petitioner changed the wording on its menu from catering platters to party platters and introduced a super mini tray size that includes 12 rolls.

11. Petitioner asserts that the business was subject to a prior audit and he was told by an auditor that his catering platters were not subject to sales tax. However, there was no evidence presented that indicated such a conclusion. Petitioner did not have any documentation from a previous audit or the name of the auditor to establish that the Tailgate Deli was previously audited concerning the taxability of the sale of party platters.

### ***CONCLUSIONS OF LAW***

A. Section 1105 (d) (i) of the Tax Law imposes a tax, in pertinent part, 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 . . .

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(3) in those instances where the sale . . . is for consumption off the premises of the vendor, except where food . . . [is] (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.”

B. The sales and use tax regulation at 20 NYCRR 527.8 specifically provides that a sales tax is imposed on every sale of food and drink, in pertinent part, as follows:

“in those instances where the sale is for consumption off the premises of the vendor all sandwiches and other food or drink unless the food or drink is sold in: (i) an unheated state; and (ii) the same form and condition, quantities and packaging commonly used by food stores not principally engaged in selling foods prepared and ready to be eaten.” (*see* 20 NYCRR 527.8 [a] [3] [i], [ii]).”

The party platters at issue are intended to be consumed off premises. Therefore, in order for the party platters to be excluded from sales tax, petitioner must establish that the food is sold in an unheated state and are in the same form and condition, quantities and packaging that is used when selling the food at the store.

C. Petitioner argues that the platters are not properly characterized as prepared food. Specifically, petitioner states that his platters provide individual components to create a sandwich. Therefore, since the sandwich is not yet assembled when the customer takes the platters off premises, petitioner reasons that it logically follows that the sandwiches are not prepared to eat. Petitioner asserts that the party platters should be exempt as sales of food and food items. This analysis fails to account for the language of both the statute and the regulations.

Tax exemption statutes are strictly construed against the taxpayer and exemptions must be clearly indicated by the statutory language (*see Matter of Fagliarone v Tax Appeals Trib.*, 167 AD2d 767 [3d Dept 1990]; *see also Matter of Grace v New York State Tax Commn*, 37 NY2d 193 [1975] *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NY2d 330 [1975]). In order for the party platters to be excluded from sales tax, the Tailgate Deli must establish that it sells any non-taxable items in the same condition, quantities and packaging that is used when a

food store sells the same items (*see* Tax Law § 1105 [d] [i] [3]). This is critical to an understanding of what is meant by prepared foods.

Petitioner sells its meats and cheeses pre-sliced. Additionally, petitioner pre-slices the lettuce, tomatoes, onions and banana peppers. Petitioner also individually packages the condiments. It is this preparation of the items for the sandwiches that makes the platters prepared food. There is no need to heat any of the items and, as such, these platters are ready for consumption, despite the fact that the customer needs to assemble the sandwich to their particular taste.

In his brief, petitioner argues that his product is sold in the same form and condition, quantities, and packaging as is commonly used by retail food stores. This assertion is simply not accurate. Petitioner prepares the condiments into individual packaging. At a food store, these condiments are sold in either jars or bottles. The platters include lettuce, tomatoes and onions that are pre-sliced and served in separate containers. In a food store, these items are sold in their usual, whole form and are not pre-sliced. It is this preparation in creating the platters that differs from how the same items are sold in a food store.

D. The Division issued a tax bulletin that directly addresses the issue involving both taxable sales of food and exempt food and food products that is illustrative. In *Food and Food Products Sold by Food Stores and Similar Establishments* (NY St Dept of Taxation & Fin Tax Bulletin TB-ST-283), the bulletin listed that cold cut platters are considered food prepared by the seller and ready to be eaten.

The facts of this case clearly establish that the party platters are ready for immediate consumption. Although petitioner emphasizes that the contents on the platters require further assembly by the ultimate consumer in order to be ready for immediate consumption as a

sandwich, this argument ignores the statute and regulations. All the preparation has been completed by petitioner prior to the platters being sold. Another prepared food item that is instructive on this issue is self-service salad bars. Clearly, salads need to be assembled by the ultimate consumer from a variety of salad bar items that are pre-sliced and arranged in a way that is convenient for the customer to create a salad and buy it from the store. Such salads are taxable as prepared foods by the store. Similar to the party platters sold at the Tailgate Deli, the food options on a salad bar are prepared and not sold in their usual form and condition, nor in packaging and quantities as generally sold within the store. It is the preparation of the contents of the salad bar that constitutes the characterization of such salads as prepared food.

The evidence demonstrates that the party platters sold by the Tailgate Deli are arranged in a way that is inconsistent with how meats, cheeses, vegetables and condiments are sold at a food store. As such, the platters are properly subject to sales tax as prepared foods pursuant to the plain language of Tax Law § 1105 (d) (i) (3).

E. The petition of Todd A. Neupert is denied and notice of determination, dated May 27, 2020, is sustained.

DATED: Albany, New York  
November 16, 2023

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE