



Sales of prepackaged sushi products prepared and packaged by an outside seller

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Tax: Sales and Use Tax

Taxpayer requested a Letter Ruling on the application of the New Jersey Sales and Use Tax Act (N.J.S.A. 54:32B-1 et seq.) to sales of packaged sushi products it sells which are purchased by Taxpayer from an outside seller who prepares and packages them.

Facts

In addition to not providing utensils to the buyer, Taxpayer does not provide a "food court" or other space for a purchaser to sit down and consume the sushi or any other purchased food item. No such accommodations are available. The products must be taken off Taxpayer's premises to be consumed.

Taxpayer is under the 75% threshold for sales of prepared food.

Issue

Whether sales of packaged sushi products sold by Taxpayer, who is under the 75% threshold for sales of prepared food, are subject to Sales Tax when such products are purchased by Taxpayer from an outside seller who prepares and packages them.

Discussion

The New Jersey Sales and Use Tax Act imposes tax on the retail sale of tangible personal property, services, and specified digital products unless a valid exemption exists. N.J.S.A. 54:32B-3.

N.J.S.A. 54:32B-8.2 defines "food and food ingredients" as "substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value." This term does not include tobacco, alcoholic beverages, candy, or soft drinks. While the sale of food and food ingredients purchased for human consumption is exempt from Sales Tax under N.J.S.A. 54:32B-8.2 of the Sales and Use Tax Act, the sale of "prepared food" is not. N.J.S.A. 54:32B-3(c) (1). N.J.S.A. 54:32B-3(c) (1)(i) defines "prepared food" as:

1. Food sold in a heated state by the seller; or
2. Food items that are a result of the seller combining two or more food ingredients to make a single item; or
3. Food sold with eating utensils (plates, cutlery items, glasses, cups, napkins or straws. Plates do not include containers for transport).

"Prepared food" also includes the following, but only when sold with utensils:

1. Food sold by a seller whose primary NAICS classification is manufacturing in section 311, except subsector 3118 (bakeries);
2. Food sold in an unheated state by weight or volume as a single item; or
3. Bakery items sold as such, including but not limited to, bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pie, tarts, muffins, bars, cookies, and, tortillas.

N.J.A.C. 18:24-12.2A sets forth the rules to be used to determine whether food is sold with eating utensils "provided by the seller." Under that regulation, if a business' gross annual sales of 1) food sold in a heated state or heated by the seller and, 2) food which is the result of the seller mixing or combining two or more food ingredients to make a single item, are more than 75% of its total sales of food and food ingredients (excluding alcohol) then utensils merely have to be made available by the seller for the sale to be considered one of "prepared food", which is taxable in New Jersey.

All sales are treated as being sold with utensils "provided by the seller," and are taxable as "prepared food" if the business exceeds the 75% threshold and has a kiosk or other area where napkins, forks, straws, etc. are available to customers.

The only exception to the above rule is for the sale of items that contain four (4) or more servings packaged as one item sold for a single price. These "bulk items" do not become prepared food due to the seller having utensils available (e.g., whole cakes, loaves of bread). Whenever available, serving sizes will be determined based on the label on the item sold. If no label is available, a seller will reasonably determine the number of servings in the item. N.J.A.C. 18:24-12.2 A(b).

Under N.J.A.C. 18:24-12.2A, the 75% threshold is calculated as follows:

First, determine the numerator, which is comprised of the total dollar value of sales of prepared food that is either sold in a heated state or heated by the seller; plus sales of prepared food made up of two or more food ingredients mixed or combined by the seller for sale as a single item; plus sales of food that cannot be transferred to the purchaser without plates, bowls, glasses, cups, or other utensils (e.g., fountain beverages, salad bar); then divide the numerator determined above by the total dollar value of all sales of food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks, but not including alcoholic beverages.

For sellers with a sales percentage of 75% or less, utensils are considered to be "provided by the seller" if the seller's practice (as represented by the seller) is to physically give or hand the utensil to the purchaser for use in consumption of the item, except that plates, bowls, glasses, or cups necessary for the purchaser to receive the food (e.g., dispensed milk, salad bar) need only be made available.

For sellers with a sales percentage greater than 75%, utensils are considered to be provided by the seller" if utensils are merely made available to purchasers. Thus, utensils at a kiosk or common area are treated as utensils "provided by the seller."

Conclusion

Taxpayer does not sell sushi in a heated state by the seller. Taxpayer does not combine two or more food ingredients to make sushi. As Taxpayer is below the 75% threshold for sales of prepared food, sales of sushi by Taxpayer are not considered to be sold with eating utensils unless Taxpayer actually hands the customer a utensil which is intended for use in consumption of the sushi. Therefore, sales of sushi by Taxpayer, which are purchased in packaged form from an outside seller, are not subject to Sales Tax as prepared food.

A Letter Ruling is limited to the facts set forth therein and is binding on the Division of Taxation only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. A Letter Ruling is based on the law, regulations, and Division policies in effect as of the date the Letter Ruling is issued or for the specific time period at issue in the Letter Ruling.