

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FOREST VIEW ADULT DAY CARE	:	DETERMINATION
	:	DTA NO. 820297
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 September 1, 1998 through	:	
November 30, 1999.	:	

Petitioner, Forest View Adult Day Care, 457 Doughty Boulevard, Inwood, New York 11096, 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 September 1, 1998 through November 30, 1999.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 8, 2005 at 11:00 A.M., with all briefs to be submitted by February 10, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner's refund application.

FINDINGS OF FACT

1. Petitioner, Forest View Adult Day Care ("Forest View"), a division of Forest View Nursing Home, Inc., is an outpatient facility for adults located at 457 Doughty Boulevard in

Inwood, New York. Forest View provides health services, therapeutic services (physical therapy and occupational therapy), social services, meals and social activities (“adult day services”) to adults with developmental disabilities, including emotional and mental disabilities, and elderly adults, age 70 and older. Opened approximately eleven hours a day, six days a week,¹ petitioner provides adult day services to its clients in two five-hour shifts, to wit, a first shift which runs from approximately 8:30 A.M. until approximately 1:30 P.M. and a second shift which runs from approximately 2:00 P.M. until approximately 7:00 P.M.

2. In September 1998, petitioner contracted with a vendor, Brooklyn Enterprises, to supply the food and drinks which Forest View ultimately served to its clients during the two shifts on a daily basis as well as the paper products used in such service. Petitioner began purchasing its food, drinks and paper products from Brooklyn Enterprises in September 1998 and continues to do so. During the period September 1, 1998 through November 30, 1999, petitioner paid sales tax on its purchases of food from Brooklyn Enterprises.² Petitioner also paid sales tax on its purchases of paper products and drinks from Brooklyn Enterprises.

3. On November 29, 2001, petitioner filed an Application for Credit or Refund of Sales or Use Tax requesting a refund of \$123,480.00. In its request, petitioner asserted that the supplier of bulk food to Forest View erroneously charged sales tax on bulk food sales to the adult day care center during the period September 1, 1998 through September 30, 1999.³

¹ Forest View is open Sunday through Friday and is closed on Saturday, in observance of the Sabbath. It is also closed on Jewish holidays.

² In October 1999, Brooklyn Enterprises ceased charging sales tax on the food it supplied to petitioner.

³ Specifically, the refund claim is for sales tax charged on bulk food sales to petitioner from September 23, 1998 through September 30, 1999, which charges are reflected on a total of 14 monthly invoices dated October 1, 1998 through October 1, 1999.

4. On November 6, 2003, the Division of Taxation (“Division”) denied, in full, Forest View’s claim for refund of sales tax stating as follows:

The refund claim is for sales tax paid on bulk purchases of ingredients used to prepare meals. Upon audit, it was determined that the purchases are of heated and cooled foods, and no cooking is done on the premises. The ovens and refrigerators on premises are used solely to maintain the proper serving temperature of the meals. Therefore, the purchases are subject to sales tax as catering services.

5. Jacob Davidowitz, vice president and administrator, oversees the entire operation of Forest View. In or about September 1998, Forest View began operating as a medical adult day care center. At that time, Mr. Davidowitz determined petitioner’s food, beverage and paper product needs and solicited proposals from a number of vendors, including Brooklyn Enterprises. After some negotiations, a final per unit (person) cost of \$18.71 was agreed upon and Brooklyn Enterprises prepared the contract executed by both parties.⁴

6. The contract, a poorly drafted seven-page document, required Brooklyn Enterprises (“vendor”) to “provide to [petitioner] the services described in the attached Exhibit.” In addition, the contract required the vendor “to contract out with a mutually acceptable caterer to provide a fully cooked, full course lunch and dinner daily.”⁵ The contract further provided that each shift was to “have separate delivery schedules to insure freshness and proper temperature of all foods prior to serving,” and the foods were to “be delivered in bulk in insulated containers.” However, the vendor reserved the right to make one bulk delivery for both shifts on Fridays. In addition, the contract required all foods to be prepared and delivered in accordance with all

⁴ \$17.50 of the final per unit cost is for food and the remaining \$1.21 is for paper products and drinks.

⁵ The contract required the caterer to have proper kosher and nutritional authorizations and to cook all meals salt free and sugar free. The contract also required lunch and dinner to include, among other things, a salad of the day, a soup of the day and a main course (consisting of a protein, starch and vegetable) per a daily menu.

Department of Health guidelines. The contract's terms also required Brooklyn Enterprises to supply on a daily basis all bakery items used by petitioner for the "breakfast meal and lunch/dinner desserts."

7. The contract also included a list of all meals, i.e., breakfast and lunch during first shift, and lunch (when applicable) and dinner during second shift, broken down by food group components, for which the vendor was required to provide food, drinks and paper products as well as a three-page attachment labeled "EXHIBIT," containing a list of items to be provided by the vendor to petitioner.⁶ This attachment required the vendor to provide 39 different paper product items including, among other things, foam bowls, plates and cups, plastic forks, knives, soup spoons and teaspoons, and three different dishwashing machine cleaning products. It also required the vendor to provide food products consisting of, but not restricted to, assorted name-brand cereals, assorted varieties of canned fruit (diet and regular), tuna fish, assorted fresh fruits and vegetables including, among other things, oranges, apples, pears, honeydew melons, cantaloupes, cucumbers, red and green peppers and lettuce, assorted salad dressings (diet and regular), mayonnaise, ketchup, juice (orange, apple, cranberry, grape, etc.), peanut butter, assorted fruit jellies and jams (diet and regular), coffee (regular and decaffeinated), tea bags (regular and decaffeinated), sugar packets, Sweet'n Low packets, creamers ("non dairy quarts & PC" and "non dairy pk's"), drinks (lemonade and iced tea [regular and diet]), butter reddies, milk (regular and skim), cream cheese (three-pound blocks and "200 pk's"), "indiv. Sliced American, Muenster & Swiss" cheeses, and salt free cottage cheese (three pound tubs). With respect to the food (in bulk) required to be provided by the vendor, the attachment listed, but was not limited

⁶ The items are grouped under the following six headings: paper products, food products, dishwashing machine supplies, food (in bulk), lunch for second shift and bakery products.

to, 6 specialty salads, 9 soups, 23 different main course items (chicken, beef, fish, veal, spaghetti and meatballs), 8 vegetables, 11 starches (i.e., potatoes, noodles, rice, etc.) and 4 types of dessert (i.e., fresh or canned fruit, cakes and pastries daily). For the second shift's lunch, the attachment required the vendor to provide drinks consisting of iced tea, assorted flavors of juice, coffee and tea, tuna and egg salads, American Cheese, luncheon meats such as salami, bologna, turkey breast and chicken breast, rolls, bagels, two-pound packages of bread and fresh fruit. The attachment also required the vendor to provide bakery items including, but not limited to, white and whole wheat breads, assorted rolls (kaiser, egg and onion), assorted muffins (bran, corn and blueberry), fruit turnovers, sponge cakes and marble cakes. The contract attachment further required all bakery items to be sugar free, baked fresh daily and delivered on a timely basis.

8. Ellen Gordon, RN, program director, oversees the entire day-to-day operations of all Forest View's departments, including the hiring of staff and meal service. Forest View's kitchen is equipped with, among other things, an oven, refrigerator and a large commercial style coffee maker. It also has a pantry where cereals, canned goods and other nonperishable foods are stored. Forest View's employees include a dietitian and three dietary aides who work in the kitchen. The dietitian's duties include, among other things, monitoring any special dietary needs and food allergies which Forest View's clients have, training the kitchen staff in proper food portion size and dating and rotating the large no. 10 size cans of fruit and vegetables purchased from Brooklyn Enterprises so that the staff uses the oldest cans first.

9. As noted above, since September 1998, petitioner has provided two meals during each shift as part of its adult day services. First shift clients, most of whom are adults with disabilities, receive a breakfast and a full hot lunch. Second shift clients, all of whom are elderly, receive a full hot lunch and a light dinner.

10. Served right after the first shift clients arrive, breakfast includes, among other things, cold cereal, fruit, cottage cheese and danish. While all items served at breakfast are purchased in bulk from Brooklyn Enterprises pursuant to the contract, petitioner's kitchen staff does all food preparation, including, among other things, cutting up the fruit and baked goods, portioning out the cereal and cottage cheese by dietary specifications, pouring the milk into cups or creamers and making the coffee. The light cold dinner is served during second shift shortly before the elderly clients go home on buses. This meal, also prepared by petitioner's kitchen staff, may include, among other things, tuna salad, a tossed salad, cottage cheese, fresh fruit and cake. As part of their preparation of dinner, the staff will make fresh salads including tossed salad, cut up fresh fruit and baked goods and then will portion out any salads, cottage cheese, fruits and cakes being served. Petitioner purchases the ingredients used to prepare dinner, i.e., bulk tuna fish, big containers of cottage cheese, 20-pound bags of salad greens, bulk quantities of fresh vegetables and fruits and bulk quantities of baked goods, from Brooklyn Enterprises pursuant to the contract.

11. Taking its clients' dietary and nutritional needs into consideration, petitioner's staff plans lunch menus for both shifts for an entire month and sends these menus to Brooklyn Enterprises and the caterer.⁷ Lunch menus always include a specialty salad (such as beet, cucumber and potato salads and an occasional tossed salad) or a soup, a protein main dish, a starch and a vegetable. On a weekly basis, petitioner sends written confirmation of the specific daily lunch menus and the quantity needed for each shift to Brooklyn Enterprises and the caterer responsible for preparing the food. Each day, the caterer prepares the specific food items listed on the menu in bulk, cooks all prepared food in large pans to a minimum temperature of 165

⁷ At times, each shift has a different lunch menu.

degrees, covers the pans with aluminum foil and immediately puts the pans of hot food into one or more insulated containers. When the menu includes a cold food item, such as a specialty salad, the caterer prepares that cold food item in bulk, makes sure that the cold food has a temperature of 41 degrees or lower, covers the pan with aluminum foil and puts the cold food item in an insulated container. Most of the time, each shift receives a separate delivery of the sealed insulated containers of hot and cold prepared foods for lunch.

12. Upon delivery at Forest View's kitchen, the dietician immediately breaks the seal on the insulated container, removes the pan, pulls back the aluminum foil covering and puts a food thermometer into the prepared food item to ascertain the temperature of that food. Then, the dietician reads and calls out the temperature of the prepared food item and a member of the kitchen staff records the temperature and the arrival time of that food item on a sheet which contains the date, a listing of that day's menu, and spaces to record the time of arrival of the prepared food items at Forest View and the temperatures of the hot and cold prepared food items at the time of delivery as well as the time the meal is served to the clients and any comments about the meal by shift ("day menu sheet"). The dietician ascertains the temperature of both hot and cold prepared foods in exactly the same manner. New York City Department of Health guidelines require the temperature of commercially prepared hot food items to be held at or above 140 degrees and the temperature of commercially prepared cold food items to be held at or below 45 degrees. The dietician rejects any prepared food item when the temperature at delivery is less than 140 degrees for hot food and greater than 45 degrees for cold food because of bacterial contamination. The fact that the food is returned to the caterer is noted on the day menu sheet along with the temperature of the food at arrival. At the end of the year, petitioner receives a credit for all hot and cold prepared foods returned to the caterer during the past year

against purchases on that current month's invoice. On days when the prepared food has been rejected, petitioner's staff goes out and buys prepared food and serves it to the clients. If the temperatures of the hot and cold prepared foods are within acceptable temperature limits, they are accepted by Forest View's kitchen staff.

13. Although Forest View requests that the hot and cold prepared foods be delivered about an hour or an hour and a half before the shift's lunch is scheduled to be served, the caterer does not always comply with that request. Whenever cold prepared food is delivered to and accepted by Forest View, the kitchen staff refrigerates it until they are ready to portion it out and serve it to the clients at that shift's lunch. When hot prepared food is delivered to and accepted by Forest View two or more hours prior to the scheduled lunch time, the kitchen staff immediately refrigerates the hot food in compliance with Department of Health guidelines. About an hour and a half before lunch time, the refrigerated hot food is placed in Forest View's oven where it is heated to proper serving temperature, i.e., 165 degrees. Hot food delivered and accepted about an hour and a half before a shift's lunch time is immediately placed into Forest View's ovens to bring it up to the 165 degree proper serving temperature. When the proper serving temperature is reached and it is time for lunch, the kitchen staff takes the hot food out of the oven, places it on a steam table, portions it out and serves it to the clients. On days when only one delivery of hot and cold prepared foods for both shifts is made, the hot and cold prepared foods for the second shift's lunch are refrigerated until it is time to heat the hot food to the proper serving temperature. After the hot food reaches the proper serving temperature and it is time for the second shift's lunch, the kitchen staff removes the hot food from the oven, places it on the steam table and portions it out. Any cold prepared food is taken out of the refrigerator and portioned out when it is the second shift's lunch time. The quality of both shifts' lunch

meals is also monitored and noted on the day menu sheet by the kitchen staff. Ms. Gordon regularly discusses lunch menu issues with the caterer.

14. All portioned food, making up breakfast and lunch during first shift and lunch and dinner during second shift, is brought out by the kitchen staff to the main dining room where it is served to Forest View's clients.

15. Based upon the number of clients it expects to serve during the coming week, petitioner orders fresh fruits and vegetables, baked goods and dairy products in bulk from Brooklyn Enterprises. It also orders canned goods, other nonperishable foods, coffee and tea in bulk based upon the number of clients served during each shift on a weekly basis. Either Brooklyn Enterprises or one of its suppliers delivers the food in bulk quantities as specified by the contract to petitioner. Specifically, among other items, fresh fruits and vegetables are supplied in their natural raw state in large crates, salad greens are provided in large 20-pound bags, ground coffee is supplied in 10-pound bags, baked goods including, among other items, 2-pound loaves of bread, assorted muffins and rolls and other baked goods are supplied in large quantities, milk is supplied in 1-gallon bottles, cottage cheese is supplied in 3-pound containers and canned fruits and vegetables are supplied in large no.10 cans.

16. Forest View received monthly invoices and attached detail sheets from Brooklyn Enterprises reflecting its sales of bulk food, paper goods and drinks and any special service⁸ during the period September 23, 1998 through September 30, 1999. While each invoice contained five separate columns labeled "Quantity," "Item," "Description," "Unit Price" and "Amount," Brooklyn Enterprises listed "BULK FOOD" and a specific dollar amount in the

⁸ Sometimes a client requests a special food item and petitioner asks Brooklyn Enterprises to obtain and deliver it. Brooklyn Enterprises charges petitioner for those items as special service on the monthly invoices. Those amounts are not part of the refund claim.

description and amount columns only. However, a detail sheet attached to each invoice contained additional information about the bulk food sales. For its sales of “PAPER GOODS & DRINKS” and “SPECIAL SERVICE,” Brooklyn Enterprises listed specific information under all five columns. At the bottom of each invoice, Brooklyn Enterprises separately listed the subtotal amount due, the amount of sales tax due on the subtotal and the total amount due on the invoice.

17. As noted above, Brooklyn Enterprises attached a detail sheet to each invoice sent to petitioner reflecting sales made during the period September 23, 1998 through September 30, 1999 because Mr. Davidowitz requested a further breakdown of the \$17.50 per unit (person) cost of the bulk food items being supplied pursuant to the contract. Each detail sheet listed the specific period and invoice number for which additional information was being provided as well as the total quantity, i.e., total number of units, supplied at a total cost of \$17.50 per unit and the total amount due. Each sheet also listed the following breakdown of the \$17.50 per unit cost: “bulk food,” to wit, the hot and cold prepared foods supplied to and served by petitioner as lunch for both shifts, had a \$7.50 per unit cost, “bulk bread, rolls, cookies and baked goods” (“bulk baked goods”) had a \$3.00 per unit cost, “canned vegetables, fruits, desserts, etc.” had a \$2.50 per unit cost and “fresh vegetables, fruits, milk, coffee, etc.” had a \$4.50 per unit cost.

18. A review of the invoices and detail sheets indicates that Brooklyn Enterprises made bulk food sales to Forest View totaling \$1,457,085.00 during the period September 23, 1998 through September 30, 1999. Further review of the detail sheets indicates that during that period, bulk food (hot and cold prepared food) sales totaled \$624,465.00, sales of bulk baked goods totaled \$249,786.00, sales of canned vegetables, fruits and desserts, etc. totaled \$208,155.00 and sales of fresh fruits and vegetables, milk, coffee, etc. totaled \$374,679.00.

19. Petitioner did not receive invoices with any deliveries from Brooklyn Enterprises or any of its designees. Rather, petitioner received the detail sheet outlined above as an attachment to each month's invoice.

CONCLUSIONS OF LAW

A. Tax Law § 1105(d)(i) imposes a tax on:

The receipts from every sale of . . . food and drink of any nature or of food alone, when sold . . . by . . . other establishments in this state, or by caterers . . .

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

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(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.

Tax Law § 1132(c)(1) provides, in pertinent part, as follows:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer.

B. The sales tax regulations, 20 NYCRR 527.8(f), concerning caterers, in pertinent part, provide the following:

(1) Sales by caterers.

(i) All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable.

(ii) Sales of food or drink by caterers where the caterers merely deliver the items purchased and offer no other services after delivery are deemed to be sales for off-premises consumption and are taxable in accordance with the provisions of subdivision (a) of this section.

(iii) Sales of food or drink by caterers where the caterers deliver the items purchased and arrange the food on platters or place the drink in containers so that food or drink is ready to serve to guests are taxable.

The regulations at 20 NYCRR 527.8(a) provide, in pertinent part, that:

Sales tax is imposed on the receipts . . . from every sale of . . . food or drink of any nature sold . . . by caterers:

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

(2) in those instances where the sale is for consumption off the premises and the vendor (or someone acting on behalf of the vendor) after delivery either serves or assists in serving, cooks, heats or provides services with respect to the food or drink; and

(3) 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.

20 NYCRR 527.8(e) provides as follows:

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, six rolls and one 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.

C. During the period September 1, 1998 through November 30, 1999, petitioner, an adult day care center, paid sales tax on bulk food purchased from Brooklyn Enterprises. Subsequently, petitioner filed a refund request alleging that the bulk food supplier erroneously charged sales tax to the adult day care center. Based upon its determination that petitioner's bulk food purchases are of heated and cooled foods and no cooking is done on petitioner's premises, the Division concluded that the purchases are subject to sales tax as catering services and denied petitioner's refund request in full. Petitioner contends that its food purchases are exempt from the imposition of sales tax by Tax Law § 1105(d)(i)(3).

Statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision provides his or her entitlement to the exemption (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867, 472 NYS2d 744, *affd* 64 NY2d 682, 485 NYS2d 526). It is petitioner's position that its bulk food purchases totaling \$1,457,085.00 during the period September 1, 1998 through November 30, 1999, which it claims fall into two categories, "cold foods" and "prepared foods," are nontaxable because of the manner in which Brooklyn Enterprises sold and delivered the food to petitioner.

D. Petitioner contends that Brooklyn Enterprises improperly charged sales tax on its sales of cold foods to the adult day care center totaling \$832,620.00 (\$249,786.00 in sales of bulk baked goods plus \$208,155.00 in sales of canned vegetables, fruits and desserts, etc. plus \$374,679.00 in sales of fresh fruits and vegetables, milk, coffee, etc.), during the period

September 1, 1998 through November 30, 1999. It claims that Brooklyn Enterprises sold and delivered cold foods, such as, baked goods, canned fruits, vegetables and desserts, fresh fruits and vegetables, dairy products and coffee, to the adult day care center unheated and in the same form and condition, quantities and packaging commonly used by food stores for off-premises consumption and therefore these sales of cold foods are not subject to sales tax.

The evidence clearly establishes that the cold foods which Brooklyn Enterprises, as vendor, sold and delivered in bulk to petitioner during the period at issue are exempt from sales tax pursuant to Tax Law § 1105(d)(i)(3). The poorly drafted contract required the vendor to provide (sell and deliver) to petitioner food products, including, but not limited to, canned fruits, canned vegetables, fresh fruits, fresh vegetables, milk, cottage cheese and coffee. It also required the vendor to supply (sell and deliver) to petitioner on a daily basis all needed fresh sugar free baked goods including, among other items, assorted breads, assorted rolls, assorted muffins and cakes. The vice president and administrator in charge of all operations at Forest View, Mr. Davidowitz, credibly testified about the quantity, form and manner in which food products are sold by Brooklyn Enterprises to petitioner. Based upon the number of clients it expects to serve during the coming week, petitioner orders canned fruits, vegetables and desserts, fresh fruits and vegetables, dairy products and fresh baked goods from Brooklyn Enterprises. Either Brooklyn Enterprises or one of its suppliers delivers these food products in bulk quantities to petitioner. Large no. 10 size cans of fruits, vegetables and desserts are delivered to petitioner, whereupon these canned goods are stored in the pantry until they are used by petitioner's kitchen staff as part of a meal served to its clients. Ten-pound bags of coffee are delivered to petitioner and are used by petitioner's kitchen staff to prepare coffee in the kitchen's large commercial coffee maker. A produce market delivers fresh fruits and vegetables in their natural raw state in

large crates and petitioner's kitchen staff prepares and cuts up these fruits and vegetables before serving them to its clients. Large size dairy products including, among other items, one-gallon bottles of milk and three-pound containers of cottage cheese, are delivered by Brooklyn Enterprises to petitioner, whose kitchen staff pours or portions out and serves them to the clients. On a daily basis, a bakery delivers fresh baked goods including, among other items, two-pound loaves of assorted types of breads, assorted types of rolls, assorted varieties of muffins and cakes to petitioner. Depending upon the meal being served, petitioner's kitchen staff may, among other things, cut up the baked goods, such as the rolls, muffins and cakes, or use the loaves of bread or rolls to make sandwiches, and serve them to clients. Clearly, Brooklyn Enterprises sold and delivered unheated (cold) foods, commonly sold in food stores in bulk by weight, by the dozen or by volume for off-premises consumption, to petitioner during the period September 1, 1998 through November 30, 1999 (*see*, 20 NYCRR 527.8[a][3]; [e][1], [2][i], [iii]). Therefore, Brooklyn Enterprises's sales of bulk quantities of cold foods, i.e., baked goods, canned fruits, vegetables and desserts, fresh fruits and vegetables, milk and coffee, etc., are exempt from taxation pursuant to Tax Law § 1105(d)(i)(3).

E. Petitioner contends that Brooklyn Enterprises improperly charged sales tax on its sales of prepared foods (the foods used as part of the lunches served to both shifts) in bulk to the adult day care center totaling \$624,465.00 during the period September 1, 1998 through November 30, 1999. Petitioner admits that Brooklyn Enterprises hired a caterer who prepared and shipped foods to Forest View in large insulated containers. However, petitioner asserts that the prepared foods are never delivered to Forest View at a ready-to-eat temperature and must be heated to 165 degrees in order to be served, because the insulated containers in which the prepared foods are delivered merely slow the cooling process and prevent bacterial contamination. Since Forest

View must bring the prepared foods up to the proper serving temperature, petitioner argues that these foods are not “ready to eat” and therefore are not taxable. Petitioner’s argument is without merit. Tax Law § 1105(d)(i)(3) imposes a tax on the receipts from “every sale of food and drink of any nature or of food alone, when sold . . . by caterers” where the sale is for consumption off the premises of the vendor unless the food or beverage is sold unheated and in the same form, condition, quantities and packaging commonly used by food stores not principally engaged in selling food prepared and ready to be eaten. If the caterer only delivers the food or beverage, the sale is taxable only if it is taxable as an off-premises sale (20 NYCRR 527.8[f][1][ii]). The sales tax is imposed on all sales of sandwiches or heated food or beverage for off-premises consumption (20 NYCRR 527.8[a][3]). Other prepared foods or beverages sold for off-premises consumption are taxable unless they are sold in an unheated state, and in the same form and condition, quantities and packaging commonly used in establishments that are food stores other than those principally engaged in selling foods prepared and ready to be eaten (20 NYCRR 527.8[a][3][i], [ii]). Whether a food or beverage is sold in a heated state depends upon the vendor’s sales methods (20 NYCRR 527.8[e][1]). If the vendor attempts to maintain the food at a temperature warmer than the surrounding air temperature by artificial means, or cooks to order, the vendor is selling food in a heated state (20 NYCRR 527.8[e][1][i]). The contract required Brooklyn Enterprises to hire a caterer, with proper kosher and nutritional authorizations, to provide fully cooked, sugar and salt free, foods per a daily menu to Forest View. After planning an entire month’s lunch menus for both shifts, petitioner sends these menus to Brooklyn Enterprises and the caterer responsible for preparing the foods. On a weekly basis, petitioner sends written confirmation of the specific daily lunch menus and the quantity needed for each shift to both Brooklyn Enterprises and the caterer. Each day, the caterer prepares and then fully

cooks all foods specified on that day's menu in large pans and, after covering the pans with aluminum foil, immediately puts them into large insulated containers, which the caterer then seals. Immediately upon delivery, the sealed insulated containers are opened, the pans of prepared foods are removed and Forest View's dietician checks the internal temperature of each pan of prepared food with a food thermometer. In accordance with New York City Department of Health guidelines, the prepared foods are accepted if the internal temperature is 140 degrees or higher and rejected if the internal temperature is lower than 140 degrees. Depending upon the time of delivery, the kitchen staff will either put the prepared foods into the oven to bring them up to proper serving temperature (165 degrees) or put them into the refrigerator in compliance with Department of Health guidelines. Clearly, since the caterer hired by Brooklyn Enterprises prepared and cooked the food to order and delivered the prepared foods at a temperature warmer than the surrounding air temperature, Brooklyn Enterprises sold the prepared foods in a heated state to Forest View (*see*, 20 NYCRR 527.8[d],[e][1][i]). Therefore, the prepared foods are properly subject to tax (*see*, Tax Law § 1105[d][i][3]; *see also*, 20 NYCRR 527.8[a][3]).

F. The record includes the monthly invoices and attached detail sheets, prepared and sent by Brooklyn Enterprises to petitioner, on which the contested sales tax was imposed. Brooklyn Enterprises collected sales tax on its sales of bulk food, paper goods and drinks and any special service. Each detail sheet contained a clear breakdown of the bulk food sales made by Brooklyn Enterprises during the period covered on the invoice referenced on that sheet. Based upon the breakdown set forth on the detail sheets, petitioner divided the bulk food sales into two categories, "cold foods" and "prepared foods." Petitioner's cold foods category include the sales of bulk bread, rolls, cookies and baked goods (bulk baked goods), sales of canned vegetables, fruits and desserts, etc. and sales of fresh fruits and vegetables, milk, coffee, etc. While

petitioner's prepared food category only consisted of the sales of bulk food, to wit, the hot and cold food prepared by the caterer and served by petitioner as lunch for both shifts, petitioner is seeking a refund of the sales tax it paid on all of the bulk food (cold foods and prepared foods) purchased from Brooklyn Enterprises. In Conclusion of Law "D", I determined that the sales of bulk baked goods (i.e., bulk bread, rolls, cookies and baked goods), canned vegetables, fruits and desserts, fresh vegetables and fruits, milk, coffee, etc., categorized as cold foods by petitioner, qualify for exemption from taxation. Therefore, taking that determination into consideration, the Division is directed to recompute the sales tax due in this matter and issue a refund accordingly.

G. The petition of Forest View Adult Day Care is granted in accordance with Conclusions of Law "D" and "F", and in all other respects the Division of Taxation's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York
August 10, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE