

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TODD A. NEUPERT</b>	:	DECISION
	:	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 an exception to the determination of the Administrative Law Judge issued on November 16, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York, on August 22, 2024, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Administrative Law Judge erred in determining that petitioner is liable for sales tax on the sale of party platters pursuant to Tax Law § 1105 (d).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. Those facts are set forth below.

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). 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.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began her determination by setting forth the provisions of Tax Law § 1105 (d) that impose sales tax on prepared food and drink. The Administrative Law Judge noted that in order for the party platters at issue to be excluded from sales tax, petitioner must demonstrate that the food sold was in an unheated state and in the same form and condition, quantities and packaging used when selling such food at a store. Further, the Administrative

Law Judge noted that tax exemption statutes are strictly construed against the taxpayer and exemptions must be clearly indicated by the statutory language.

The Administrative Law Judge found that petitioner sells its meat and cheeses pre-sliced; that petitioner pre-slices the lettuce, tomatoes, onions, and banana peppers; and that petitioner individually packages the condiments. According to the Administrative Law Judge, the preparation in creating the platters differs from how the same items are sold in a food store, and this difference is reflected in the Division's tax bulletin that sets forth that cold cut platters are considered food prepared by the seller and ready to be eaten for purposes of the sales tax.<sup>1</sup>

The Administrative Law Judge disagreed with petitioner's argument that because Tailgate Deli's platters provided individual components to create a sandwich, the party platters are not subject to sales tax. Since the sandwiches are not yet assembled when the customer takes the platters off premises, petitioner reasoned that it logically follows that the sandwiches are not prepared to eat and, accordingly, party platters should be exempt as sales of food and food items. The Administrative Law Judge found that this analysis fails to account for the language of both the statute and the regulations and concluded that the party platters are arranged in a way that is inconsistent with how meats, cheeses, vegetables, and condiments are sold at a food store and thus the party platters are subject to sales tax.

Accordingly, the Administrative Law Judge denied the petition and sustained the notice of determination.

#### ***ARGUMENTS ON EXCEPTION***

In his exception, petitioner argues that the sandwich rolls, lettuce, tomatoes, onions, banana peppers, mayonnaise, mustard, and oil are all served off the platter (i.e. on the side).

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<sup>1</sup> *Food and Food Products Sold by Food Stores and Similar Establishments* (NY St Dept of Taxation & Fin Tax Bulletin TB-ST-283).

Petitioner contends that the Administrative Law Judge erred in finding that petitioner did not present any evidence of a previous audit. Petitioner presents an email chain between the auditor and petitioner (*see* petitioner's ex 8).<sup>2</sup> Petitioner further contends that the Administrative Law Judge failed to correctly interpret the relevant law and that the party platters at issue were sold in an unheated state and intended to be consumed off the premises and thus receipts therefrom should not be subject to sales tax (*see* 20 NYCRR 527.8). Next, petitioner argues that the legal definition of "prepared food" is as defined by the New York State Department of Environmental Conservation.<sup>3</sup> Petitioner continues to make the same argument as below that because the sandwiches required assembly prior to consumption, the party platters cannot not be considered "prepared foods" and accordingly should be exempt from sales tax. Petitioner states that the sides given with platter (onions, tomatoes, banana peppers, etc.) are complimentary. Petitioner argues that Tax Law § 1105 (d) is in direct conflict with Tax Law § 1115 (a) (1). According to petitioner, under Tax Law § 1115 (a) (1), certain cooked food is exempt from sales and compensating use tax which is contrary to Tax Law § 1105 (d) (providing that food must be sold in an unheated state to be exempt).

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge. The Division has long held that sales of deli platters are taxable sales of prepared food. The Division cites Tax Law § 1105 (d) (i) (3) (A) (B), which states that sales tax is imposed upon the sale of food where the sale is made for consumption off the premises of the vendor, except where food other than sandwiches or drinks are "(A) sold in an unheated state and, (B) are

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<sup>2</sup> It is clear from the emails that the 2016 visit from the Department was not an audit and so there was no documentation.

<sup>3</sup> "Prepared food" means food or beverages that are cooked, chopped, sliced, mixed, brewed, frozen, heated, squeezed, combined, or otherwise prepared on the premises of a covered food service provider for immediate consumption and require no further preparation to be consumed. Prepared food includes but is not limited to ready to eat takeout foods and beverages (*see* petitioner's exception, ex 4).

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.” Further, the Division argues that the regulations explicitly state sales of cold cuts arranged on a platter are taxable, whether sold by a food store or a deli (20 NYCRR 527.8 [e]). The Division’s regulations and guidance provides definitions of taxable and non-taxable food products, and no deference should be given to a definition promulgated by the New York State Department of Environmental Conservation. According to the Division, petitioner prepared the party platters in a manner that was inconsistent with how food is typically sold in food stores for off-premises consumption. Additionally, the Division notes that petitioner’s platters can be consumed as sold (i.e. without any further preparation). Notwithstanding the fact that some of the components of the platter may be exempt from sales tax, since petitioner sells all the components of the platter for one price, the entire charge is subject to tax.

### ***OPINION***

Unprepared food is generally exempt from sales tax, with some exceptions not applicable here (*see* Tax Law § 1115 [a] [1]). The exemption from sales tax for food and food products requires that the food be sold unheated and in the same form and condition, quantities, and packaging as is commonly used by retail food stores (*see* Tax Law § 1105 [d], 20 NYCRR 527.8 [e] [2]). “It shall be presumed that all receipts for property or services of any type mentioned in Tax Law § 1105 (a) – (d) are subject to tax until the contrary is established, and the burden of proving any receipt is not taxable thereunder shall be upon the person required to collect the tax” (*Matter of Strata Skin Sciences, Inc.*, Tax Appeals Tribunal, May 5, 2022, *confirmed* 225

AD3d 953 [3d Dept 2024], quoting *Matter of Parikh v Schmidt*, 200 AD3d 1237, 1239 [3d Dept 2021]).

The party platters here at issue were prepared by petitioner compiling a number of products in ready-to-eat form either as is or through some further preparation such as by making a sandwich with the products provided. Petitioner did not sell the cold cuts by weight, but rather arranged them on a food platter with cheeses and condiments, also prepared by petitioner, selling the combined products as a single group under one charge making it a taxable sale (*see* TB-ST-283). Petitioner's platter preparation included separating the condiments into individual packaging instead of the traditional jars or bottles and included pre-sliced lettuce, tomatoes, and onions whereas retail stores would typically sell them unsliced.

Petitioner argues that the opportunity for additional preparation, such as by making sandwiches with the food provided, negates his own preparation or the readily consumable nature of the foods provided. Many foods that are ready to eat can be augmented in some fashion and so we decline to adopt his reasoning. Petitioner also argues that the bread provided remains in its original bag and the condiments were provided for no additional charge as part of the platter package. This does not change the result as all of the foods were provided in combination with the others as part of a package under one charge in a single receipt (*see e.g.* 20 NYCRR 527.1 [b], giving an example of the so-called "cheeseboard rule").

We agree, therefore, with the Administrative Law Judge's determination that the preparation work done by petitioner in creating the platters differentiated the deli trays from the same items sold separately at food stores not primarily in the business of selling prepared foods. This interpretation is in accordance with Tax Law § 1105 (d) and 20 NYCRR 527.8 (e), and,

therefore, the sales of the deli platters here at issue were properly held to be subject to sales tax as prepared food.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Todd A. Neupert is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Todd A. Neupert is denied; and
4. The notice of determination issued on May 27, 2020, is sustained.



DATED: Albany, New York  
February 13, 2025

/s/ Jonathan S. Kaiman  
Jonathan S. Kaiman  
President

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner

/s/ Kevin A. Cahill  
Kevin A. Cahill  
Commissioner