



QUESTION: Whether XXXXX XXXXX XXX' s bakery products and bakery products packaged in decorative tins and boxes constitute food products exempt from sales tax as defined in Section 212.08(1)(b), Fla. Stat., and whether XXXXX XXXXX XXXXX must register with the Florida Department of Revenue (the "Department") as a dealer required to file sales and use tax returns with the Department.

ANSWER: Yes, the bakery products described are considered tax-exempt food products sold by a bakery for consumption off the premises, pursuant to Florida law and rule. Although XXX XXXXX XXX also sells non-exempt items, which consist of brownies, cookies and bars sold in decorative boxes and tins, it is not required to register as a dealer in Florida because there exists no nexus with Florida which would subject these sales to taxation.

February 28, 2020

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Technical Assistance Advisement (TAA)
TAA #: 20A-003
Taxpayer Name: XXX XXXXX XXX
FEIN: XXXXXXXXXXXX
Sales & Use Tax – Restaurants, Bakeries, Caterers
Sections 212.0596, 212.06, 212.08, and 212.18, Florida Statutes
Rules 12A-1.011 and 12A-1.097, Florida Administrative Code

Dear Mr. XXXXXX,

This is in response to your letter dated August 21, 2019, requesting this Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to Section 213.22, Florida Statutes (Fla. Stat.), and Chapter 12-11, Florida Administrative Code (Fla. Admin. Code), regarding the taxability of bakery products sold exclusively via the internet by a non-Florida business. Your request has been carefully examined, and the Department

finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, Fla. Admin. Code.

As provided in Section 213.22(1), Fla. Stat., a technical assistance advisement may be issued to a taxpayer who requests an advisement relating to the exemptions in Section 212.08(1) or (2), Fla. Stat., at any time. Technical assistance advisements shall have no precedential value except to the taxpayer who requests the advisement, and then only for the specific transaction addressed in the technical assistance advisement, unless specifically stated otherwise in the advisement.

This response to your request constitutes a TAA and is issued to you under the authority of Section 213.22, Fla. Stat.

Issue

Whether Taxpayer's brownies, cookies, and bars, as well as brownies, cookies, and bars packaged and sold in decorative containers, constitute food products exempt from sales tax as defined in Section 212.08(1)(b), Fla. Stat., and whether Taxpayer must register with the Florida Department of Revenue (the "Department") as a dealer required to file sales and use tax returns with the Department.

Facts Provided by Taxpayer

Taxpayer is an XXXXXX corporation whose operations are located in XXXXX, XXXXXX. It is a bakery solely dedicated to the exclusive manufacture and sale of brownies, cookies, and bars for human consumption. At times, Taxpayer's baked goods may be packaged in a decorative container, which is of substantially less value than the food items contained therein.

Taxpayer's brownies, cookies, and bars are sold exclusively through the company's website, through telephone orders to the company, and through third party internet platforms. However, no inventory is stored in any warehouse in Florida, nor does a third party fulfill any of Taxpayer's orders. No deliveries are made to Florida using Taxpayer's own vehicle. All food products are packaged in non-returnable containers and shipped to customers directly from XXXXX through a common carrier. Taxpayer does not have any employees, agents, or other representatives working in Florida, nor does it have an office, warehouse, or other place of business located in Florida. Taxpayer is not currently registered for sales/use tax purposes in Florida.

Law and Discussion

Exempt Food Products

In accordance with Section 212.08(1)(a), Fla. Stat., general groceries, which include food products for human consumption, are exempt from taxation. Pursuant to Section 212.08(1)(b), Fla. Stat., "...the term 'food products' means edible commodities, whether

processed cooked, raw, canned, or in any other form, which are generally regarded as food.” Tax-exempt food products include baked goods that are ready-to-eat, cookies, and bakery products sold by bakeries that do not have eating facilities. See Rules 12A-1.011(2)(a)2., 12A-1.011(2)(a)9., and 12A-1.011(3)(d), respectively. Additionally, Form DR-46NT, incorporated by reference in Rule 12A-1.097, Fla. Admin. Code, includes in its list of tax-exempt general groceries “baked goods,” “cookies,” and “bakery products sold by bakeries... that do not have eating facilities.”

Taxpayer’s baked items thus meet the definition of “food products,” as set forth in Section 212.08(1)(b), Fla. Stat., and constitute a tax-exempt bakery product sold by a bakery that does not have eating facilities, as set forth in Rule 12A-1.011(3)(d), Fla. Admin. Code.

However, you relate that Taxpayer also sells these exempt food products in reusable decorative tins and wooden boxes. Rule 12A-1.011(10), Fla. Admin. Code, provides the following guidelines regarding sales of exempt food products sold in conjunction with taxable products such as decorative baskets, cans, glasses, or jars:

(a) When a package contains both exempt food products and taxable tangible personal property (e.g., a basket of food and candy, a basket of nuts, or decorated cans or glasses filled with food items) and the tax-exempt food products are separately itemized and priced from the taxable tangible personal property, no tax is due on the tax-exempt food products.

(b) When the total charge for a package containing both exempt food products and taxable tangible personal property is a single charge, the application of tax depends upon the essential character of the complete package, as follows:

1. When the taxable tangible personal property represents more than twenty-five (25) percent of the value of the package, the total charge is subject to tax.

2. When the taxable tangible personal property represents twenty-five (25) percent or less of the value of the package, the total sale is exempt. The seller is required to pay tax on any taxable items included in the package that were purchased tax-exempt for the purposes of resale. The cost price of any promotional items included in the package is subject to tax.

Although the food products (brownies, cookies, bars) may be exempt from sales tax, the exemption may not apply when such products are sold as a package, along with taxable tangible personal property such as decorative wooden boxes and tins, for a single price. If the value of the box or tin is greater than 25% of the value of the package, the total charge for the package is subject to sales and use tax. If the value of the decorative box or tin is 25% or less of the total sales price, the lump-sum amount charged is not subject to sales and use tax.

Nexus to Florida

Section 212.18(3), Fla. Stat., provides that all persons must be registered with the Department of Revenue before engaging in business subject to sales tax in Florida. Florida law defines those persons who are required to register, collect, and remit tax as "dealers." Section 212.06(2)(b), Fla. Stat., defines the term "dealer" to include every person who imports tangible personal property from any state or foreign country into Florida for sale, use, consumption, or distribution, or for storage in Florida. The term "dealer" includes a retailer who transacts mail order sales. See Section 212.06(2)(c), Fla. Stat.

It is a well-settled principle that visible territorial boundaries will not always establish the limits of a state's taxing power or jurisdiction. In the past, courts have turned to the activities of out-of-state dealers to establish the necessary ties, or "nexus," between an out-of-state dealer and taxing state.

While physical presence is no longer required after the *Wayfair* case (South Dakota v. Wayfair, Inc. et al., 138 S.Ct. 2080 (2018)), the U.S. Supreme Court reaffirmed the principles set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), governing the constitutional validity of a state tax. More specifically, state tax laws still must:

- a. apply to an activity with a substantial nexus (sufficient connection) to the taxing state;
- b. be fairly apportioned (not taxing beyond the state's fair share);
- c. not discriminate against interstate commerce (not taxing out-of-state activity while exempting in-state activity); and
- d. be fairly related to the services provided by the state.

Mail order sales are addressed in Section 212.0596(2), Fla. Stat. That statute provides twelve (12) factors that indicate when a dealer who makes mail order sales is subject to taxation by the State of Florida.

Under the specific facts presented here, the Taxpayer does not have nexus with the State of Florida for purposes of Sales and Use Tax.

Concluding Statement

The bakery products described are considered tax-exempt food products sold by a bakery that does not have eating facilities, pursuant to Florida law and rule. Even though Taxpayer does, in some instances, sell taxable products - baked goods packaged in decorative wooden boxes and tins - it is not required to register as a dealer in Florida because it appears to have no nexus with the state of Florida. However, if nexus with Florida were to occur in the future, the non-exempt products, as described above, would be taxable.

This response constitutes a Technical Assistance Advisement under Section 213.22, Fla. Stat., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in Section 213.22, Fla. Stat. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request, and related backup documents are public records under Chapter 119, Fla. Stat., and are subject to disclosure to the public under the conditions of Section 213.22, Fla. Stat. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material, and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 10 days of the date of this letter.

Respectfully,

Donna La Plante

Donna La Plante
Senior Attorney
Florida Department of Revenue
Technical Assistance and Dispute Resolution

Record ID: #xxxxxx