



North Carolina Department of Revenue

Pat McCrory
Governor

Lyons Gray
Secretary

April 30, 2013

FEIN: [REDACTED]
Account: [REDACTED]

[REDACTED]
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[REDACTED]
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Re: Private Letter Ruling

Dear Ms. [REDACTED]

We received your letter dated October 7, 2011, in which you have requested a private letter ruling regarding the application of North Carolina sales and use tax on business transactions. Your request was assigned to a former employee. Please accept our apology for the delay in responding.

It is our understanding you “sell muffins, cookies (i.e., general baked goods that [you] will make in-house) and coffee. On a condiments counter that is accessible by anyone who enters [your] shop [you] will place plastic forks and knives. [Your] customers may use them or may not use them. It is their choice.” Your inquiry relates to whether the sale of general baked goods and coffee in such a scenario would be considered “sold without eating utensils” for purposes of North Carolina sales and use tax.

“Prepared food” is defined by N.C. Gen. Stat. § 105-164.3(28) as “[f]ood that meets at least one of the conditions this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.

- a. It is sold in a heated state or is heated by the retailer.
- b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.
- c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws.”

Pursuant to the provisions of N.C. Gen. Stat. §105-64.13B, prepared food may be exempt from state tax (and therefore only subject to a 2% local tax) if classified as “bakery items sold without eating utensils by an artisan bakery.” N. C. Gen. Stat. § 105-164.13B(a)(4) defines “artisan bakery” as a bakery that meets all the following requirements:

- a. It derives over eighty percent (80%) of its gross receipts from bakery items.
- b. Its annual gross receipts, combined with the gross receipts of all related persons as defined in [N. C. Gen. Stat. §] 105-163.010, do not exceed one million eight hundred thousand dollars (\$1,800,000).

Information as to when bakery items are considered to be sold without eating utensils is included in Sales and Use Tax Technical Bulletin 19-2 B.5. The phrase "provided by the seller or retailer" with respect to utensils" is interpreted by the Department in part as follows:

Utensils need only be made available to purchasers if a seller's sales of prepared food in a. and b. of the "prepared food" definition at an establishment are more than 75% of the seller's total sales at the establishment. The numerator includes sales of (1) prepared food if under a. and b. of the definition of prepared food; and (2) food where plates, bowls, glasses, or cups are necessary to receive the food. The denominator includes sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks. Alcoholic beverages are not included in the numerator or denominator.

The prepared food sales percentage is determined annually for all of the seller's establishments in the State. The percentage is calculated by the seller for each tax year or business fiscal year, based on the seller's data from the prior tax year or business fiscal year, as soon as possible after records are available, but not later than 90 days after the beginning of the tax or business fiscal year.

Provided your sales of prepared food (coffee bakery items) are more than 75% of the total sales and since utensils are made available to all customers, the items are subject to the combined state and local sales tax, which is currently 6.75% in Wake County, in addition to any prepared food taxes that may be levied by the county directly.

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the factual situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

If you have any questions, you may contact me at the telephone number listed below.

Sincerely,

[REDACTED], Director - Sales and Use Tax Division