

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-12(29)S
Sales Tax
October 24, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120620B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED], through their representative, [REDACTED]. Petitioner asks if, edible gummy drinking cups known as [REDACTED] are subject to sales and use tax pursuant to 1105(a) and 1110(a) of the Tax Law.

We conclude that the exemption from sales and use tax as provided in section 1115(a)(1) of the Tax Law does not apply to the sale of [REDACTED] on the ground that it is a confection.

Facts

Petitioner produces an edible gummy drinking cup known as [REDACTED]. The product is available in five flavors in accordance with the five tastes: salty – lime, sour – lemon, bitter – bitters, sweet – vanilla, and spicy – pepper. The product is vegan and composed of pectin, evaporated cane sugar, plus all natural flavors, and colors.

The shelf life for the product is one week and the product must be consumed within that time. The product does not need to be refrigerated, but it should not be stored in hot temperatures. The product must be kept in its packaging (a heat sealed bag) until right before serving/consuming. The product is currently only sold in New York City.

Analysis

Tax Law section 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Tax Law section 1115(a)(1) exempts from sales tax food and food products. Section 528.2(a)(2) of the Sales and Use Tax Regulations provides that “food and food products” means edible commodities whether prepared, processed, cooked, raw, canned or in any other form generally regarded as food.

Candy and confectionery are not exempt from sales and use tax. *See* Tax Law § 1115(a)(1)(i). Regulation section 528.2(a)(4) provides that “[c]andy and confectionery include, without limitation, candy of all types: chocolate (plain or mixed with other products); glazed or sugar-coated fruits, nuts, peanuts, popcorn, or other products; chewing gum; mints; lollipops; fruit flavored sticks; fruit drops; licorice; pastilles; cotton candy; marzipan; halvah and any similar product regarded as candy or confectionery based on its normal use or as indicated on the label or in advertising thereof.” The primary focus in determining taxable status should be on

what the product is (i.e., what it consists of) and how the product fits within the statutory and regulatory scheme. *See* TSB-A-09(38)S.

As set forth in a Department of Taxation and Finance issued Tax Bulletin, TB-ST-103, a number of factors are considered in determining if something is candy/confectionery or a food product including: how the product is labeled, packaged, advertised, displayed and sold. Petitioner's product is advertised on its website as, "all natural pectin confections." Based on the product's ingredients (e.g. evaporated cane sugar, pectin) and the fact that Petitioner advertises the product as a confection, we conclude that it is not exempt as a food product pursuant to Tax Law section 1115(a)(1), and is therefore subject to sales and use taxes.

DATED: October 24, 2012

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department 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. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.