

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-81(31) S  
Sales Tax  
October 5, 1981

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810527A

On May 27, 1981 a Petition for Advisory Opinion was received from Herman H. Gerstman, CPA, 4020 Hempstead Turnpike, Bethpage, New York 11714.

The issue raised is whether the operator of a soft ice cream stand is entitled to exemption on purchases of electricity used to prepare and store soft ice cream.

Petitioner states that prepared mixtures and milk are placed in a mixing machine and mixed to produce the soft ice cream. The soft ice cream is sold in various forms, such as cones, sundaes, shakes and splits. Some of the ice cream is also bulk packaged for storage in a freezer.

Section 1105(a) of the Tax Law imposes a tax on "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article." The sale of electricity or electric service is subject to tax pursuant to section 1105(b). Also, section 1105(d) imposes a tax on "The receipts from every sale of . . . food and drink or food alone, when sold in or by restaurants, taverns or other establishments in this state . . . : (1) in all instances where the sale is for consumption on the premises where sold; . . . 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 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."

Food, food products, beverages, dietary foods and health supplements sold for human consumption are exempt from the tax imposed pursuant to section 1105(a). Tax Law § 1115(a)(1). Such exemption provision further states: "Nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five."

Section 1115(a)(12) of the Tax Law provides an exemption for: "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, . . . for sale, by manufacturing, processing . . ." In explaining the application of the manufacturing exemption, the Sales and Use Tax Regulations state: "Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale . . ." 20 NYCRR 528.13(b). The Regulations further provide that: "Machinery or equipment is used predominantly in production, if over 50% of its use is directly in the production phase of a process." 20 NYCRR 528.13(c)(4).

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Section 1115(c) exempts from the tax imposed pursuant to section 1105(b): ". . . electricity . . . for use or consumption directly and exclusively in the production of tangible personal property . . . for sale, by manufacturing, processing . . ." The Regulations relating to this exemption state: "'Exclusively' means that the . . . electricity . . . and like services are used in total (100%) in the production process." 20 NYCRR 528.22(c)(3).

The Sales and Use Tax Regulations include dairy bars and ice cream stands among the types of establishments which sell food and drink subject to the tax imposed pursuant to section 1105(d) of the Tax Law. 20 NYCRR 527.8(b).

Cones, sundaes, shakes, splits and similar hand prepared or dispensed items are food items subject to tax pursuant to section 1105(d) of the Tax Law, whether sold for consumption on or off premises. Based on a decision of the New York State Court of Appeals (*Burger King, Inc. vs. State Tax Commission* 51 NY 2nd 614), the exemptions provided in sections 1115(a)(12) and 1115(c) for machinery, equipment and utilities used in the production of tangible personal property for sale are not applicable to the preparation of food and drink which are subject to tax pursuant to section 1105(d). However, the sale of ice cream in bulk (pint, quart, half-gallon, gallon), prepackaged novelty items and ice cream cakes is a retail sale which is exempt pursuant to section 1115(a)(1) as such items are in the same form, condition, quantity and packaging found in food stores. 20 NYCRR 527.8(e).

Thus, electricity used to prepare ice cream for sale as cones, sundaes, shakes, splits and similar items is taxable.

Since the ice cream prepared in the machine is ready for sale upon dispensation, production ends at that point and electricity used to operate the freezer in which the bulk ice cream is subsequently stored is subject to tax pursuant to section 1105(b). Only the portion of electricity consumed in the mixing machine to prepare ice cream for sale in bulk (pints, quarts, half-gallons, gallons), prepackaged novelty items and ice cream cakes is eligible for the exemption provided in section 1115(c). Also, provided more than 50% of the use of the mixing machine is devoted to processing bulk ice cream, prepackaged novelty items and ice cream cakes, such machine is also eligible for exemption. Tax Law § 1115(a)(12) and 20 NYCRR 528.13(c)(4).

DATED: September 18, 1981

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau