

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

TSB-A-81(46)S
Sales Tax
November 5, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810728B

On July 28, 1981 a Petition for Advisory Opinion was received from Tri City Desserts, Inc., 3781 Delaware Avenue, Tonawanda, New York 14217.

The issue raised is whether a fast food restaurant operated by Petitioner is considered to be a manufacturing operation and, therefore, entitled to a tax exemption on its purchases of utilities.

Petitioner purchases soft ice cream mix and by means of an ice cream freezer unit produces a soft serve ice cream. Petitioner also prepares and serves hamburgers, hot dogs and other food products for consumption by its patrons, either on or off Petitioner's premises.

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, certain 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 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).

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:

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"'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 fast food operators, ice cream stands and hamburg and hot dog stands among the types of establishments which are required to collect the tax imposed pursuant to section 1105(d) of the Tax Law. 20 NYCRR 527.8(b).

The Department of Taxation and Finance issued an interpretive policy statement on August 10, 1981 which discusses the tax status of machinery and equipment purchased by restaurants, diners and similar establishments as follows:

"It is the policy of the Department of Taxation and Finance to hold taxable all purchases of machinery, equipment and supplies used in the preparation of food by restaurants, diners and similar establishments, as well as energy sources or utilities used to operate such machinery and equipment. The production exemption contained in section 1115(a)(12) of the Tax Law does not apply to the above mentioned purchases, as they are not used to produce tangible personal property for sale. They process and deliver restaurant food, a category distinct from tangible personal property. (See Regulation section 528.13(c), example 6.) This policy is consistent with the decision reached by the New York Court of Appeals in the matter of Burger King, Inc., v State Tax Commission, 51 NY 2d 614." TSB-M 81(11)S.

Petitioner is making sales of food and drink within the purview of section 1105(d) of the Tax Law. Therefore, based on a decision of the New York State Court of Appeals (Burger King, Inc. v. State Tax Commission 51 NY 2d 614), the exemptions 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), pre-packaged 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).

Accordingly, Petitioner's purchases of utility services are subject to tax pursuant to section 1105(b) of the Tax Law, except to the extent such utilities are consumed in operating the mixing machine to prepare ice cream for sale in bulk (pints, quarts, half-gallons, gallons), pre-packaged novelty items and ice cream cakes. Utilities used for such purpose are exempt pursuant to section 1115(c). Also, Petitioner is liable for tax on all purchases of machinery and equipment used to prepare and serve food and drink, unless more than 50% of the use of a machine is devoted to preparation of bulk ice cream, pre-packaged novelty items and ice cream cakes for sale. In this instance, such machine is also eligible for exemption. Tax Law § 1115(a)(12) and 20 NYCRR 528.12(c)(4).

DATED: October 20, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau