

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

TSB-A-90 (38)S  
Sales Tax  
July 24, 1990

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900417C

On April 17, 1990 a Petition for Advisory Opinion was received from Clinton's Ditch Co-op Co., Inc., P.O. Box 477, Pardee Road, Cicero, New York 13039.

The issue raised by Petitioner, Clinton's Ditch Co-op Co. Inc., is whether its purchases and sales of certain packaging materials are subject to sales tax.

Petitioner purchases plastic trays in which it sells all of its 2 Liter product. The trays have a useful life of over three years. The cost of the plastic trays to the Petitioner vary from \$1.85 to \$2.15 each depending on the quantity ordered and market conditions. Petitioner charges a \$2.00 deposit for each plastic tray. The tray remains with the product for display in most retail stores. When the product is sold by the retailer, he returns the tray to the wholesaler who returns it to the Petitioner. For each return the \$2.00 deposit is refunded. The tray is then refilled with filled plastic bottles and the cycle continues.

Petitioner also sells pre-mix soft drinks in tanks that are delivered by the wholesaler to restaurants and attached to dispensing equipment. The tanks have a useful life of over three years. Petitioner charges a \$33.00 deposit to its wholesalers. The cost of the tanks to the Petitioner are currently \$34.00 each. From time to time the deposit is adjusted to reflect any change in the cost of the tanks. When the tanks are returned to Petitioner for refilling, Petitioner refunds the deposit.

There is no written agreement between the Petitioner and its wholesalers requiring them to return the trays and tanks, although there is an oral agreement that they will return them if they want their deposits to be refunded. If a wholesaler does not return either the trays or the tanks they are invoiced for them at Petitioner's cost by the Petitioner. Since the Petitioner holds the deposits, the wholesaler is required to pay only the difference between the cost of the item and the amount of the deposit. The amount to be paid is generally a small amount since the amounts of the deposit are very close to the cost of the items.

Section 1115(a)(19) of the Tax Law provides that:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten: . . .

(19) Cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale,

and actually transferred by the vendor to the purchaser.

Section 528.20 of the Sales and Use Tax Regulations provides in part:

Cartons, containers, and wrapping and packaging materials and supplies. [Tax Law, §1115(a)(19)] (a) Exemption.

(1) The sale of cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser, is exempt from sales and use tax. . . .

(b) Definitions. (1) Packaging material includes, but is not limited to: bags, barrels, baskets, binding, bottles, boxes, cans, carboys, cartons, cellophane, coating and preservative materials, cores, crates, cylinders, drums, excelsior, glue, gummed labels, gummed tape, kegs, lumber used for blocking, pails, pallets, reels, sacks, spools, staples, strapping, string, tape, twine, wax paper and wrapping paper actually transferred with the product to the purchaser.

(2) The term vendor in this section refers to any person who sells tangible personal property whether manufacturer, wholesaler, retailer, processor or assembler.

(3) The term purchaser in this section refers to any person purchasing tangible personal property from a vendor, whether or not he is the ultimate consumer.

(4) Actually transferred means that the packaging material is physically transferred to the purchaser, for whatever disposition the purchaser wishes.

Example 1: A returnable soda bottle may be returned for a refund of deposit or disposed of otherwise. Such a bottle is actually transferred to the purchaser and may be purchased without payment of tax. . . .

Petitioner's transfer of the trays and tanks to its customers constitute exempt sales of containers and packaging materials in accordance with the meaning and intent of Section 1115(a)(19) of the Tax Law and Sections 528.20(a)(1) and (b) of the Sales and Use Tax Regulations since they were actually transferred to the customer for whatever disposition the customer wishes.

It should be noted that in Nehi Bottling v Gallman, 39 AD 2d 256, aff'd 34 NY 2d 808 the Court held that Nehi sold the bottles to its distributor even though Nehi's contract with its distributor contained a provision requiring the return of the bottles to Nehi. Petitioner is operating in substantially the same manner as in Nehi in that although there is an oral agreement between the wholesaler and the Petitioner to return the trays and tanks, there is no requirement to do so.

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Accordingly, Petitioner may purchase the plastic trays and soft drink tanks for resale without the payment of sales tax in accordance with Section 1101(b)(4) of the Tax Law and is not required to collect sales tax on the trays and tanks it transfers to its wholesalers.

DATED: July 24, 1990

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions  
are limited to the facts set forth therein.