

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

TSB-A-93 (38)S
Sales Tax
June 21, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930107B

On January 7, 1993 a Petition for Advisory Opinion was received from Mr. Wynn Vogel, 1865-77th Street (C-9), Brooklyn, New York 11214-1233.

The issues raised by Petitioner, Wynn Vogel, are:

- (1) Whether the sales of a product called "PB Max" are subject to sales tax.
- (2) Whether the sales of a product called "Twix" are subject to sales tax.

PB Max is a product which is sold both as an individual item and in a family carton of six individually wrapped items. PB Max, according to the packaging, is a "real peanut butter snack, made with real peanut butter, crunchy wholegrain cookie, all covered in pure milk chocolate". According to the label on the packaging, its principal ingredients are peanut butter, milk chocolate, oats, flour, partially hydrogenated vegetable oil and sugar.

Twix is also a product which is sold as an individual item and in a family pack. Twix, according to the packaging is a "chocolate caramel cookie". According to the label on the packaging, its principal ingredients are milk chocolate, enriched flour, partially hydrogenated soybean oil, sugar and corn syrup.

Section 1115 of the Tax Law provides, in part:

(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:

- (1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery

Section 528.2 of the Sales and Use Tax Regulations provides, in part:

Food and beverages. [Tax Law, §1115(a)(1)] (a) Food and food products.

(1) Food and food products, except candy and confectionery, when sold for human consumption, are exempt from sales and compensating use tax

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(4) Candy 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, marshmallow; marzipan, halvah and similar products regarded as candy or confectionery based on its normal use or as indicated on the label or the advertising thereof.

Both PB Max and Twix bars are versions of chocolate coated wafer cookies. The PB Max bars have a layer of peanut butter added to the wafer before the chocolate is applied. The Twix bars have a layer of caramel added atop the wafer before the chocolate is applied. Each of the products is similar to products produced by several other companies and these other products are treated as food items exempt from sales tax. These other products are packaged in bulk packages and are advertised and marketed as cookies or snacks. PB Max and Twix bars are packaged in several different configurations and are advertised as cookies or snacks.

Since both PB Max and Twix bars are somewhat similar to other products which are recognized as cookies or snacks and, therefore, are not taxed for sales tax purposes, PB Max and Twix bars in family packs which are advertised, marketed and sold as packaged cookies or snacks will be considered food items in accordance with Section 1115(a)(1) of the Tax Law and Section 528.2(a)(1) of the Sales and Use Tax Regulations and will be exempt from sales tax.

However, when PB Max and Twix bars are packaged in individual single or two bar packages or when such single or two bar packages are sold in a multi-pack and are advertised, displayed and sold as candy in the candy section of retail stores, these products will be considered to be candy or confectionery in accordance with Section 528.2(a)(4) of the Sales and Use Tax Regulations. Accordingly, when sold in the manner described in this paragraph, sales of PB Max and Twix bars will be subject to sales tax as candy and confectionery and will not qualify for the exemption provided under Sections 1115(a)(1) of the Tax Law and Section 528.2(a)(1) of the Sales and Use Tax Regulations.

DATED: June 21, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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