

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(3)S
Sales Tax
January 18, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050225A

On February 25, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Sun Orchard Fruit Company, Inc., 2087 Transit Road, Burt, New York, 14028.

The issue raised by Petitioner, Sun Orchard Fruit Company, Inc., is whether purchases of the chemical described below by a fruit wholesaler are subject to sales tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is in the business of cleaning, sorting, packaging, and storing apples that it then sells to various grocery stores. Petitioner purchases apples from various farmers, then cleans, sorts, packages and stores them for sale. After apples are unloaded at Petitioner's facility and prior to cleaning and sorting them, the apples are treated with a gaseous chemical. The chemical, commercially known as SmartFresh™, is used to stop the natural tendency of the apples to continue to ripen and spoil.

The active ingredient in SmartFresh is a gas known as 1-methylcyclopropene (1-MCP). Petitioner quotes Dr. Sylvia Blankenship, one of the researchers involved in the discovery of 1-MCP, as follows:

Ethylene is a naturally occurring plant hormone that causes some fruits to ripen. Unlike other plant hormones, it is a gas. In normal fruit ripening, ethylene is produced in the fruit, and it then attaches to a receptor molecule. Ethylene attaching to the receptor is much like a key fitting in a lock, with ethylene as the key, and the receptor as the lock. When ethylene attaches to the receptor, it is like the lock turns and a door opens. A cascade of events then takes place, such as the fruit begins to soften, produce volatiles, and change color. Another gas, 1-methylcyclopropene (1-MCP), is able to attach to the ethylene receptor. It also can act as a key that goes into the lock, but it is unable to turn the lock and open the door. When the 1-MCP key is in the lock, it is not possible for the ethylene key to go in the lock. It is in this way that 1-MCP can act as an ethylene inhibitor for fruit ripening.

A typical postharvest scenario might be to enclose a plant product, such as apples, in an airtight container/room. 1-MCP gas would be released into the air and penetrate the product. After a short period of time (hours), the product would be returned to air. The product would then continue on the postharvest route to the buyer. In apples, it appears that treatment with 1-MCP permanently blocks the ethylene receptors. (S Blankenship, Potential MCP Revolution. 16th Annual Post harvest Conference, Yakima, WA. 2000)

A key benefit of treating apples with 1-MCP is improved retention of fruit firmness enabling Petitioner to market a product which will remain saleable for a substantially longer period of time (up to several months) than an untreated product. The improved retention of fruit firmness is evidence that the 1-MCP has become permanently attached to ethylene receptor sites in the apples and continued its activity after removal of the apples from storage and following shipment to the buyer.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1115(a)(1) of the Tax Law provides an exemption from the sales and use tax for:

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

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

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. See section 528.27 of this Part for exempt purchases of candy and confectionery when purchased with food stamps.

(2) The terms *food* and *food products* as used in this section mean edible commodities whether prepared, processed, cooked, raw, canned or in any other form, which are generally regarded as food. This category includes, but is not limited to:

meat and meat products	jellying agents
milk products	fats, oils and shortenings
cereals and grain products	condiments
baked goods	spices
vegetables and vegetable products	sweetening agents
fruits and fruit products	food preservatives
poultry	food coloring
fish and seafood	frozen dinners
frozen entrees and desserts	snacks (except candy and confections)

* * *

(3) The phrase *sold for human consumption* means that the items sold are, in their normal use, regarded as being for human consumption. Pet foods, which are packaged, labeled or advertised as such, are not deemed sold for human consumption.

Opinion

Petitioner purchases apples from various farmers, then cleans, sorts, packages and stores the apples for sale, ultimately selling them to various grocery stores. During its storage of the apples, Petitioner applies 1-MCP to the apples in order to extend their shelf life.

Section 1115(a)(1) of the Tax Law exempts food and food products when sold for human consumption from sales and use tax. The terms *food* and *food products* include food preservatives. See section 528.2(a)(2) of the Sales and Use Tax Regulations. While the term *food preservative* is not defined in the Tax Law or Regulations, Merriam-Webster's Collegiate Dictionary (10th ed 1993) defines the word *preservative* as "an additive used to protect against decay, discoloration, or spoilage."

It appears from the facts in this Opinion that 1-MCP acts as an additive used by Petitioner to protect its apples against decay, discoloration, or spoilage. Therefore, 1-MCP is considered a food preservative as contemplated in section 1115(a)(1) of the Tax Law and section 528.2 of the Sales and Use Tax Regulations. Accordingly, Petitioner's purchases of 1-MCP, for use in food sold for human consumption, are exempt from sales tax.

DATED: January 18, 2006

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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