

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(38)S
Sales Tax
August 26, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080915A

On September 15, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from (Petitioner) [REDACTED].

The petition requests clarification on whether “Fruit Snacks,” “Fruit Gushers,” and “Craisins” are subject to sales tax.

We conclude that these products are not subject to sales tax.

Facts

Petitioner operates a supermarket chain and sells the three products referred to above.

The ingredients of “Fruit Gushers-tropical flavors” as listed in order on a package of this product are: “pears from concentrate, sugar, dried corn syrup, corn syrup, modified corn starch, fructose, partially hydrogenated cottonseed oil, grape juice from concentrate, citric acid, sodium citrate, glycerin, natural and artificial flavor, vitamin C.”

The ingredients of “Fruit Snacks-berries N Cherries” as listed in order on a package of this product are: “juice from concentrates (apple, grape, pear, peach and pineapple) corn syrup, sugar, modified corn starch, fruit puree, (apple, strawberry and raspberry) gelatin, citric acid, lactic acid, natural and artificial flavors, vitamins C, E and A.”

The ingredients of “Craisins - Original” are: “cranberries and sugar.” Petitioner provided the following description of the production process of “Craisins,” from the manufacturer of this product:

Frozen cranberries are first sliced, and the juice is partially extracted from the cranberry piece/hull. Then it is submerged into a bath which contains characterizing juice (Blueberry or Grape or Pomegranate) and sugar (sweetness) and citric acid. It slowly infuses the piece/hull. Next it is drained and dried to a low moisture reading (which will not support bacterial growth).

Petitioner also provided the ingredients of “Fruit Rollups- wildberry punch” as listed in order on a package of this product: “pears from concentrate, corn syrup, sugar, partially hydrogenated cottonseed oil, citric acid, sodium citrate, acetylated mono and diglycerides, pectin, malic acid, natural flavor, vitamin C.”

Analysis

Section 1105(a) of the Tax Law imposes sales tax on receipts from the retail sale of tangible personal property. Section 1115(a)(1) in part exempts from sales tax food and food products. One of the

exclusions from this exemption is “candy and confectionery.” There are no statutory definitions of candy and confectionery.

Section 528.2(a)(2) of the Sales and Use Tax Regulations provides that “food and food products” means edible commodities whether prepared, processed, cooked, raw, canned or in any other form generally regarded as food. A list of food and food products includes, among other things, condiments, sweetening agents, and snacks (except candy and confections).

Regulation section 528.2(a)(4) provides that “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 and any similar product regarded as candy or confectionery based on its normal use or as indicated on the label or in advertising thereof.”

The Department of Taxation and Finance has issued two publications that provide a list of taxable and exempt foods. Publication 840, “A Guide to Sales Tax for Drugstores and Pharmacies,” has two sections that characterize certain foods as being taxable or exempt. On page 4 is a listing of candies and confections. Taxable items include sugar coated nuts and raisins. “Glazed fruit” is listed as not being subject to sales tax. On page 26 is a listing of exempt foods that includes “Fruit Rollups,” sugar, and sugar substitutes.

Publication 880, “Taxable and Exempt Foods and Beverages Sold at Retail Food Markets and Similar Establishments,” provides that fruit rollups are exempt from tax. Under taxable foods, coated candies are listed. The listing for “coated candies” is footnoted to include “Sugar-, chocolate- or candy-coated nuts, raisins, malted milk balls and similar products.” There is no reference to coated fruit other than coated raisins.

The statute lacks clarity as far as the taxable status of food products that may be characterized as candy or confectionery. The law does not define these terms. The regulations in part define “candy” as “candy of all types.” It is important that there be reasonable and readily discernable standards for categorizing food products as candy or confectionery. The primary focus in determining taxable status should be on what the product is (i.e., what it consists of) and how the product fits within the statutory and regulatory scheme.

Petitioner contends that “Fruit Snacks” and the “Fruit Gushers” are similar in their ingredients to “Fruit rollups,” which are listed as exempt from tax in Tax Department Publications 840 (“Guide to Sales Tax for Drugstores and Pharmacies”) and 880 (“Taxable and Exempt Foods”). In describing the process of creating “Craisins,” Petitioner makes a distinction between coating a product and soaking the product in a sugar solution, which not just coats but infuses the product with the solution.

Our analysis based on the above standard finds that “Fruit Snacks” and “Fruit Gushers” are substantially similar in content to “Fruit rollups,” which have been deemed exempt from tax. Therefore, these two products are not subject to sales tax.

We also decide that “Craisins” are not a candy or confectionery subject to sales tax. We accept Petitioner’s argument that the process of infusing the dried cranberries with a sugar solution is a process distinct from merely coating an otherwise exempt food item with sugar or chocolate. The infusing process sweetens naturally tart cranberries so that they are suitable for consumption as a snack or baking

supply, but it does not make the cranberries candy or confectionary. Therefore, "Craisins" are exempt from tax under section 1115(a)(1) of the Tax Law.

DATED: August 26, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.