

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

TSB-A-09(54)S
Sales Tax
October 9, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S081027B

On October 27, 2008, the Department of Taxation and Finance received a petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its sales of any of the following products are subject to sales tax: fudge, halva, maple sugar candy, sushi, and gift baskets containing food products. The fudge, halva, and maple sugar candy are taxable when sold by petitioner. The sushi and gift basket products described in the request for the advisory opinion are exempt from sales tax when sold by Petitioner.

Facts

Petitioner operates a chain of supermarkets. None of the stores as to which its inquiry pertains have areas for consuming food on premises.

Petitioner prepares and sells different types of fudge products (walnut fudge, white chocolate peanut butter fudge, and chocolate fudge) by the pound at the bakery section of its supermarkets.

Halva is a product Petitioner purchases from a manufacturer. The manufacturer's label for the product describes halva as "a great dessert choice for any dinner party, tea time or simple snack." Halva is sold in the deli or kosher sections of Petitioner's supermarkets.

Petitioner also sells prepackaged sushi products purchased from a manufacturer. These sushi products are sold from a refrigerated case. None of the supermarkets in question have a sushi bar or otherwise have an area where the sushi products can be eaten on the premises.

Petitioner sells gift baskets that contain fruits, nuts, cheeses and other non-taxable products. The baskets can include shrink sleeves, bows, and gift cards. Petitioner's receipt to its customer does not itemize any of the components of the baskets.

Petitioner also sells maple sugar candy.

Analysis

Tax Law section 1105(a) imposes sales tax on the sale of tangible personal property. Food products, except candy and confectionery, when sold for human consumption, are exempt from the sales tax imposed by section 1105(a). *See* Tax Law §1115(a)(1). Tax Law section 1105(d) imposes sales tax on the sale of food by restaurants or other establishments in all instances where the sale is for consumption on the premises where sold and in those instances where the sale is for consumption off the premises of the vendor, unless the food is sold in an unheated state and in the same form and condition, quantities and packaging commonly used by food stores not principally engaged in selling foods prepared and ready to be eaten.

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; marzipan; halva and any similar product regarded as candy or confectionery based on its normal use or as indicated on the label or in the advertising thereof. *See* 20 NYCRR 528.2(a)(4). Items advertised and sold for use in cooking and baking, such as chocolate morsels and glazed fruit bits are exempt from tax. *See* 20 NYCRR 528.2(a)(5). Baked goods are also exempt from tax. *See* 20 NYCRR 528.2(a)(2).

The fudge, maple sugar candy, and halva sold by petitioner constitute candy or confectionery products for purposes of sales tax. Merriam-Webster's unabridged dictionary defines "confectionery" as an edible sweet, and defines "fudge" as "a soft creamy candy made typically of sugar, milk, butter, and flavoring." Petitioner states that it sells fudge in the bakery section of its supermarkets. The fact that the fudge is sold in the bakery is not relevant. Further, fudge is not prepared by baking and is not a baked good for sales tax purposes. Therefore, the sale of this product is subject to sales tax.

Halva, also known as halvah, is listed in the sales tax regulations as a confectionery product. Merriam-Webster's unabridged dictionary defines "halva" as a "flaky confection of crushed sesame seeds in base of honey or other syrup." Therefore, the sale of this product is subject to sales tax.

Maple syrup and maple sugar are exempt food items. Maple sugar products therefore may qualify for exemption from sales tax as food items if no other sugar, flavors, or ingredients are added. However, in the present case, as its name indicates, maple sugar candy is labeled or advertised as a candy or confectionery product. Therefore, its sale is subject to sales tax.

Petitioner's sales of prepackaged sushi products for off-premises consumption are exempt from sales tax because the product constitutes food sold in an unheated state and in the same form and condition, quantities, and packaging commonly used by other food stores that are not principally engaged in selling food prepared and ready to be eaten. However, sales of sushi for consumption on the store premises are subject to sales tax. *See* Tax Law §1105(d)(i)(1). Further, sushi is taxable when sold as meals ready to be eaten when arranged on plates or platters as individual or multiple servings. *See* 20 NYCRR 527.8(e)(3)(ii). These conclusions represent the current position of the Department. To the extent *Price Chopper Operating Co., Inc.*, Adv Op Comm T & F, June 2, 1998, TSB-A-98(38)S, or any other advice from the Department indicates a contrary position, it does not represent current policy.

The sale of gift baskets containing fruits, nuts, cheeses, and other non-taxable products are exempt from sales tax as the sale of food if the basket, wrapper, bow and gift card are ancillary elements of the sale. For example, if the cost of the basket is minimal in relation to the aggregate cost of the food items, and the customer is not given the option to select a particular basket, the basket would be considered ancillary. Alternatively, if the cost of a basket is more than minimal, or the basket is selected by the customer from a number of available choices, it could be more than an ancillary element of the sale. If the basket, wrapper, bow, and gift card are ancillary elements of the sale, these items are not deemed sold by Petitioner as such for purposes of sales tax; therefore, Petitioner would be the retail purchaser of these items. If the basket, wrapper, bow, and gift card are not ancillary elements of the sale, Petitioner will be deemed to be selling these items and will be required to collect sales tax on its sales receipts for the food basket unless Petitioner itemizes a separate charge for the food, in which case sales tax would be due only on the itemized charge for the basket, wrapper, bow, and gift card. It should be noted that, if the contents of the gift basket include both exempt and taxable items (e.g., glazed or sugar-coated fruits and nuts are subject to sales tax), then the full charge for the gift basket is taxable, unless the

price of the exempt food items is separately stated. See 20 NYCRR 528.2(a)(4) and *A Guide to Sales Tax for Drugstores and Pharmacies*, Publication 840(8/98).

Tax Law section 1115(a)(19) exempts from sales and use tax 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. The basket and wrapper qualify as packaging material for purposes of section 1115(a)(19). Therefore, Petitioner does not owe sales and use tax on its purchase of these materials. However, Petitioner is required to pay sales and use tax on its purchase at retail of bows and gift cards, which are not packaging materials.

DATED: October 9, 2009

/S/
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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.