

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

TSB-A-10(49)S  
Sales Tax  
September 30, 2010

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100809B

On August 9, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner), [REDACTED]. Petitioner asks whether “Red Bull Energy Shot” and “Red Bull Sugar Free Shot” drinks are subject to sales and compensating use taxes

We conclude that receipts from the retail sale, and uses, of such beverages are subject to State and local sales and use taxes under Tax Law sections 1105(a), 1110(a)(A), and 1210(a)(1). They are not exempt from those taxes under Tax Law section 1115(a)(1), unless sold through a vending machine for 75 cents or less. Nor are they exempt under any other provision. Food stores represented by Petitioner must collect State and local taxes on their sales of Red Bull shots at the time of sale and remit the taxes required to be collected with their timely filed returns.

**Facts**

Petitioner presented the following facts and statements as the basis of this advisory opinion. [REDACTED] is a statewide trade association representing the interests of all sizes of food stores. Petitioner’s members in New York City report being fined by the New York City Department of Consumer Affairs for charging sales tax on the retail sale of Red Bull Energy and Sugar Free Shots. Petitioner indicates that the NYC Department of Consumer Affairs takes the position that, since the products say they are dietary supplements on the label, they are not subject to sales tax, and that it is a violation of the NYC Deceptive Trade Practices Act to collect sales tax on these transactions. The distributor also claims the product is sales tax exempt. In Petitioner’s view, this is a non-carbonated beverage that is marketed primarily as an energy drink.

Petitioner submitted with its petition for advisory opinion an empty container of each of these types of Red Bull shots. The Energy Shot container lists the following ingredients: water, sucrose, glucose, taurine, citric acid, sodium citrate, caffeine, glucuronolactone, inositol, niacinamide, calcium pantothenate, pyridoxine HCL, vitamin B12, sucralose, ascorbic acid (antioxidant), natural and artificial flavors, colors. Contains caffeine comparable to a cup of premium coffee. The Sugarfree Shot container lists as ingredients: water, taurine, citric acid, sodium citrate, caffeine, glucuronolactone, inositol, acesulfame K, aspartame, sucralose, niacinamide, calcium pantothenate, pyridoxine HCL, vitamin B12, xanthan gum, ascorbic acid (antioxidant), natural and artificial flavors, colors. CONTAINS PHENYLALANINE. Contains caffeine comparable to a cup of premium coffee.

Each container bears a “Supplement Facts” box or table that states the serving size and lists amounts per serving and percentages of “DV” of calories, carbohydrates, and certain other substances. Each container also bears the following statements: “Vitalizes body and mind. Quick acting, long lasting. Improves performance, especially during times of increased stress or strain. Increases concentration and improves reaction speed. Stimulates metabolism.” There is a footnote that these statements have not been evaluated by the federal Food and Drug Administration. There is also a statement that the product is not intended to diagnose, treat, cure or prevent any disease.

## Analysis

New York State's sales and compensating use taxes are imposed by Article 28 of the Tax Law (sections 1101 through 1150). Section 1105(a) imposes the State's sales tax on every retail sale of tangible personal property. "Retail sale" means, as relevant here, a sale of tangible personal property to any person for any purpose, other than for resale as such or as a physical component part of tangible personal property (section 1101[b][4][i][A]). Section 1110(a)(A) imposes the State's compensating use tax on the purchase of any tangible personal property purchased at retail. "Purchase at retail" means a purchase by any person for any purpose other than those set forth in section 1101(b)(4)(i)(A) (1101[b][1]). "Tangible personal property" means corporeal personal property of any nature (section 1101[b][6]).

Article 29 of the Tax Law authorizes the imposition of local sales and compensating use taxes (sections 1201 through 1264). Section 1210(a)(1) authorizes every county outside New York City and every city, including New York City, to impose sales and use taxes similar to the State's sales and use taxes. Every county and several cities, including New York City, impose the section 1210(a)(1)/1105/1110 sales and use taxes. For all matters pertinent here, these county and city sales and use taxes ("local taxes") are identical to each other and to the State's sales and use taxes. Among other things, that means the local taxes have the same definitions and the same exemptions, as the State's taxes. The Commissioner's Regulations applicable to the State's sales and use taxes apply with equal force and effect to the local taxes.

Beverages are tangible personal property. Retail sales and uses of beverages such as Red Bull shots Petitioner inquires about are subject to State and local sales and use taxes, unless an exemption exists.

Tax Law section 1115(a)(1), as relevant here, exempts from State and local sales and use taxes beverages, dietary foods and health supplements, sold for human consumption, but not including soft drinks and sodas, unless they are sold for 75 cents or less through a vending machine activated by the use of coin, currency, credit card or debit card. Soft drinks and sodas include carbonated and noncarbonated beverages, carbonated water, dietetic beverages and cocktail and other alcoholic drink mixes. Red Bull shots are soft drinks or dietetic drinks. Thus, Red Bull shots are subject to State and local taxes because they are excluded from the exemption offered by section 1115(a)(1), unless they are sold through vending machines for 75 cents or less.

The Tax Commissioner has classified similar drinks as taxable, such as Awake and Gatorade. See, Publication 840, *A Guide to Sales Tax for Drugstores and Pharmacies*, page 27, and Publication 880 *Taxable and Exempt Foods and Beverages Sold at Retail Food Markets and Similar Establishments*. Those drinks have minerals and vitamins also. For example, Awake, like Red Bull shots, contains water, taurine, glucuronolactone, and several B-vitamins. Gatorade, like Red Bull shots, contains water, citric acid, and sodium citrate. Red Bull shots contain caffeine equivalent to the amount of caffeine in a cup of coffee, but the presence of caffeine does not make them coffee.

Regulations section 528.2(c) provides that a dietary food is a food for a special dietary use for humans and which bears on the label a statement of the dietary properties upon which its use is based in whole or in part. Products which are intended to substitute for the ordinary diet, or supplement the ordinary diet, or substitute for natural foods are exempt, when sold for human consumption. Among these are liquid diet products, artificial sweeteners and vitamins. It's not enough that the manufacturer

labels an item to be a dietary supplement – its ingredients must qualify as such. In addition, the labels of dietary foods should bear a statement of the dietary properties upon which the product’s use is based. Here, the statements on the Red Bull shot containers do not state any dietary properties of the drinks. Rather, the container labels merely contain general statements of the drink’s alleged effects. The labels also indicate the assertions have not been evaluated by the FDA. Red Bull shots are not exempt as a health supplement, since health supplements are products intended to substitute for natural food, and the Red Bull shots are not substitutes for natural food.

Section 1115(k) of the Tax Law provides that receipts from the sale of food eligible to be purchased with coupons issued under or pursuant to the federal Food Stamp Act of 1977 (7 U.S.C. § 2011 et seq.), as amended, from retail food stores and other participants, approved for participation under or pursuant to such act, are exempt from State and local sales and use taxes, when such food is purchased with such coupons, but only so long as the federal act conditions state participation in the food stamp program on the State exempting from State and local sales taxes purchases of food made with coupons issued under or pursuant to that act and the State participates in that program. The US Department of Agriculture Food and Nutrition Service web site indicates that, when considering the eligibility of energy drinks, and other branded products, the primary determinant as to whether the product can be purchased with food stamps is the type of product label chosen by the manufacturer to conform to Food and Drug Administration (FDA) guidelines. Energy drinks that have a “nutrition fact” label are eligible foods. Energy drinks that have a “supplement facts” label are classified by the FDA as supplements, and are therefore not eligible. The Red Bull shots samples submitted by Petitioner each have a Supplement Facts label. Thus, they are not eligible foods and cannot be purchased exempt from State or local sales tax under section 1115(k). Note that this methodology of determining whether a product can be purchased with food stamps, and thus whether the product is exempt from tax under section 1115(k), has no bearing on whether the product is exempt from sales or use tax under any other Tax Law provision.

DATED: September 30, 2010

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DANIEL SMIRLOCK  
Deputy Commissioner and 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.