

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-20(5)S
Sales Tax
May 19, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] ('Petitioner'). Petitioner asks whether the sales by Petitioner's concession stand sales are subject to New York State and/or local sales tax under Articles 28 and 29 of the New York Tax Law. We conclude that the Petitioner's concession stand sales are subject to sales tax.

Facts

Petitioner is a 501(c)(3) tax exempt organization. Petitioner also has an Exempt Organization Certificate from the Tax Department pursuant to 20 NYCRR 529.7(f). Petitioner's softball season runs from the beginning of May through the end of June with a fall ball program running from beginning of September through middle of October. Petitioner operates a concession stand during the softball season one to three days a week. At the concession stand, Petitioner sells water, soda, candy, hot dogs, and pizza. The concession stand sells mostly to participants in the softball league.

Analysis

Tax Law § 1105 provides that retail sales of tangible personal property are subject to sales tax unless a specific exemption or exclusion applies. The Tax Law also exempts certain sales by certain organizations that are exempt from sales tax. *See* Tax Law § 1116(a)(4); 20 NYCRR 529.7(e).

However, the sales and use tax exemption for exempt organizations is not without limits. Tax Law § 1116(b) provides, in part:

(b) Nothing in this section shall exempt:

(1)(i) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4), (5), or (6) of subdivision (a) of this section; (ii) sales, other than for resale, of services described in subdivision (b) or paragraph five of subdivision (c) of section eleven hundred five of this article by that organization whether or not a shop or store; (iii) retail sales of tangible personal property and sales, other than for resale, of those services by that organization, made with a degree of regularity, frequency, and continuity by remote means, such as by telephone, the internet, mail, or otherwise; or (iv) retail

sales of tangible personal property by lease or rental by that organization as lessor, whether or not at a shop or store (emphasis added).

See also 20 NYCRR 529.7(i).

A “shop or store” includes “any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity. . .”. Tax Law § 1116(b)(2) states that sales of food or drink in or by a restaurant or similar establishment are subject to sales tax even when operated by an exempt organization. (For example, see Publication 843, *A Guide to Sales Tax in New York State for Exempt Organizations*, where a girl’s youth softball league that operates a concession stand is cited as an example of an exempt organization that is required to register for sales tax purposes and to collect and remit sales tax.)

While Petitioner is an exempt organization for sales tax purposes, its exemption does not extend to sales of prepared food and beverages. Tax Law § 1105(d)(i) imposes sales tax on receipts of food and beverage “sold in or by restaurants, taverns or other establishments.” Therefore, Petitioner’s concession stand sales of water, soda, candy, hot dogs and pizza are subject to sales tax. If a receipt is provided, tax shall be stated, charged, and separately shown. *See* 20 NYCRR 532.1(b)(1). However, if no receipt is provided, the unit price method may be used. This method entails displaying to all customers a sign stating that the price of all taxable items includes sales tax. *See* 20 NYCRR 532.1(b)(4).

DATED: May 19, 2020

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.