

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from Michael G. Hilf located at P.O. Box 684, Ithaca, NY 14850 (“Petitioner”). Petitioner asks whether certain chocolate-covered marshmallow twists are subject to New York State and local sales tax.

We conclude that the chocolate-covered marshmallow twists petitioner specified in his petition are candy and/or confectionery subject to New York State and local sales tax.

Facts

Petitioner is a customer that occasionally purchases a certain chocolate-covered marshmallow twists product (“product”). Petitioner describes the product as “oblong-shaped” and states that it does “not resemble any object or character, such as hearts, bunnies, pumpkins, or Santas that are produced by other manufacturers and sold around the holidays.” Petitioner also states that, “neither the word candy nor the word confectionery appears on the packaging” of the product, a point verified by the scanned images of the front and back of the product’s packaging that accompany the petition. The product website states that it is well known for the candy and confectionery items it produces, including the product in question. Petitioner asks whether the product is subject to New York State and local sales tax if the product does not resemble any object or character, is sold year-round, and the packaging does not describe the product as either candy or confectionery.

Analysis

Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Food and food products generally are exempt from sales tax imposed on tangible personal property. *See* Tax Law § 1115(a)(1). However, candy and confectionery are specifically excluded from the types of food products covered by that exemption. *See* Tax Law § 1115(a)(1)(i) The sales tax regulations provide 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; chewing gum; mints; lollipops; fruit flavored sticks; fruit drops; licorice; pastilles; cotton candy; marzipan; halvah 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.” 20 NYCRR 528.2(a)(4). The product in question is chocolate covered marshmallows. While marshmallows by themselves are not considered candy or confectionery, a product that is not candy or confectionery by itself becomes candy or confectionery when it is dipped or coated in chocolate. *See* TB-ST-103.

Petitioner contends that the product is different from other taxable candy or chocolate covered marshmallows because the product in question is not produced in a decorative or festive shape, nor does the product, as Petitioner describes, “resemble any object or character, such as hearts, bunnies, pumpkins, or Santa’s that are produced by other manufacturers and sold around the holidays.” Petitioner also claims that the product should not be subject to tax because it is not labeled as candy and/or confectionery. How a product is marketed is relevant to, but not the sole determinant of, whether it is considered candy or confectionery. Here, it is clear from the product itself and the normal use of the product that it is candy and/or confectionery. Thus, receipts from the sales of the product are subject to tax pursuant to Tax Law § 1105(a).

DATED: July 30, 2024

/s/

MARY ELLEN LADOUCEUR
Principal Attorney

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.