

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-97(74)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970806D

On August 6, 1997, a Petition for Advisory Opinion was received from Snyder's Roast Beef & Frozen Custard, 5742 McKinley Parkway, Hamburg, New York 14075.

The issue raised by Petitioner, Snyder's Roast Beef & Frozen Custard, is whether equipment used to manufacture soft serve ice cream and prepackaged ice cream that is later sold to customers is exempt from sales tax.

Petitioner submits the following facts.

Petitioner purchased five pieces of equipment for use in its business. Four of these items use raw material to produce soft serve ice cream. The other item, a hardening cabinet, is used to freeze and harden a portion of the product, to be sold as prepackaged ice cream. The rest of the product is sold as soft serve ice cream. Petitioner purchased this equipment when the operation began and paid the sales tax at that time on all of the equipment.

Applicable Law and Regulations

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

* * *

(d) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

* * *

(3) in those instances where the sale is ... for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and,

(B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

Section 1115 of the Tax Law provides, in part;

Exemptions from sales and use taxes. (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten: (Emphasis added)

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, . . . but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. . . . (Emphasis added)

Section 527.8 of the Sales and Use Tax Regulations provides, in part:

Sale of food and drink. (Tax Law, § 1105(d)) (a) Imposition. Sales tax is imposed on the receipts, including any cover, minimum, entertainment or other charge, from every sale of beer, wine or other alcoholic beverages and food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers: . . . (emphasis added)

(b) Establishments. The following establishments, as well as other establishments engaged in the sale of food or drink for consumption on or off premises are required to collect the tax: Automats . . . Hamburg and Hot Dog Stands . . . Restaurants . . . Ice Cream Stands . . . (emphasis added)

Section 528.13 of the Sales and Use Tax Regulations provides, in part:

Machinery and equipment used in production;. . . (a) Exemption. (1) "Exemption from statewide tax." An exemption is allowed from the tax imposed under subdivisions (a) and (c) of section 1105 of the Tax Law, and from the compensating use tax imposed under section 1110 of the Tax Law, for receipts from sales of the following:

(i) Machinery or equipment (including parts with a useful life of more than one year) used or consumed directly and predominantly in the production for sale of tangible personal property, gas, electricity, refrigeration or steam, by manufacturing, processing, (Emphasis added)

* * *

(c) Directly and predominantly. (1) Directly means the machinery or equipment must, during the production phase of a process:

(i) act upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

* * *

Example 6: Machines to grind meat, make hamburg patties, cube steaks, or, slice meat; power saws and scales when used by slaughterhouses, wholesale meat houses and supermarkets, are used directly in processing tangible personal property for sale, and are exempt. However, similar machinery and equipment used by restaurants in the preparation of food and drink taxed under section 1105(d) of the Tax law, are taxable as they are not used in the processing of tangible personal property for sale. (Emphasis added)

* * *

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process. (emphasis added)

Opinion

In this case, Petitioner is producing both soft serve ice cream and prepackaged ice cream. The soft serve ice cream is not considered tangible personal property but is a restaurant food item, and Petitioner's sales of soft serve ice cream are taxable under Section 1105(d) of the Tax Law. See James F. Farrell D/B/A North Country Coldelite, Dec St Tx Comm, July 9, 1984, TSB-H-84(81)S; and Section 527.8(b) of the Sales and Use Tax Regulations. The prepackaged ice cream is considered nontaxable tangible personal property. See James F. Farrell D/B/A North Country Coldelite, supra. The machinery purchased by Petitioner must be used over 50 percent of the time directly in the production of tangible personal property for sale, to qualify for exemption from the sales and use tax under Section 1115(a)(12) of the Tax Law. Petitioner, therefore, must establish that the equipment is used over 50 percent of the time directly in producing prepackaged ice cream in order for the equipment to qualify for exemption under Section 1115(a)(12) of the Tax Law.

Petitioner's hardening cabinet, which is used to harden soft serve ice cream into a product suitable for sale as prepackaged ice cream, is used directly in the production of tangible personal property for sale. Petitioner must be able to substantiate that the equipment in this case was used more than 50 percent of the time in producing prepackaged ice cream for sale to be entitled to a refund or credit of sales and use tax.

In general, equipment dispensing soft serve ice cream does not qualify for exemption under Section 1115(a)(12) of the Tax Law. The receipts from the sale of soft serve ice cream are taxed under Section 1105(d) of the Tax Law, and there is no exemption from sales and use tax for equipment used by restaurants or other food establishments in dispensing restaurant food subject to tax under Section 1105(d). (See Matter of Burger King v. State Tax Comm., 51 NY2d 614; and Section 527.8, Example 6 of the Sales and Use Tax Regulations) However, Petitioner would be entitled to a refund or credit of sales and use tax paid on this equipment if Petitioner could substantiate that the equipment was used directly and predominantly in producing prepackaged ice cream for sale.

In addition, electricity used directly and exclusively in the production of tangible personal property for sale is exempt from sales tax under Section 1115(c) of the Tax Law. Petitioner may be entitled to a refund or credit of sales tax on the portion of electricity used directly and exclusively in the production of prepackaged ice cream. Again this credit or refund must be substantiated by Petitioner. (See Determining Electricity Used In The Production of Tangible Personal Property For Sale, Technical Services Bureau Memorandum, September 7, 1982, TSB-M-82(25)S)

To claim a refund or credit for tax erroneously paid, a person must file an application for refund or credit (Form AU-11) with the Department of Taxation and Finance. Where the tax was paid by the applicant to a vendor, the application must be filed within three years after the date when the tax was payable to the Department of Taxation and Finance by the vendor. See Section 1139 of the Tax Law and Section 534.2 of the Sales and Use Tax Regulations.

DATED: December 4, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.