

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(25)S
Sales Tax
July 11, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000824A

On August 24, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jandi's Nature Way, Inc., 24 Atlantic Avenue, Oceanside, New York 11572.

The issue raised by Petitioner, Jandi's Nature Way, Inc., is whether its sales of wheat grass juice and freshly extracted vegetable juices prepared in a health food store are exempt from sales and compensating use tax under Section 1115(a)(3) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner operates a health food store. Wheat grass juice and vegetable juices are sold at the store as described below. Petitioner describes the process by which juice is obtained from the wheat grass and vegetables as extraction. Petitioner asserts that extracting the juice, or juicing, provides nutritional advantages of plant foods in a concentrated form that is easily absorbed by the body. Petitioner states that without juicing, it is extremely difficult to get the amount of nutrition needed to reduce the risk of certain diseases. Fresh juice contains enzymes and other "living" ingredients. In contrast, canned, bottled and packaged juices have been pasteurized which keeps them on the shelf longer but causes the loss of nutrients like vitamins and minerals.

The wheat grass juice is sold in small, open top plastic containers with or without a lid or cover. The containers are one ounce, two ounces, or four ounces in size. The juice is freshly extracted to order and sold as an individual portion ready to be consumed. Wheat grass juice can be purchased and consumed on the health store premises or covered and frozen for consumption at home. However, Petitioner recommends that wheat grass juice be consumed immediately after extraction to obtain the maximum benefit from its consumption. Wheat grass juice is generally sold for on-premise consumption. A one-ounce container of wheat grass juice sells for \$1.79. A four-ounce container sells for \$7.19.

Petitioner also sells freshly prepared raw vegetable juices. The vegetable juices are freshly extracted to order and sold as an individual serving portion. Vegetable juices are sold in eight ounce or sixteen ounce cups. An eight ounce cup of vegetable juice sells for \$2.29 to \$3.99 and a sixteen ounce cup sells for \$3.49 to \$6.39 depending on the individual customer order.

Generally, these juices are consumed on Petitioner's premises at a juice bar where patrons can be seated while consuming the juices.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(d) of the Tax Law imposes the tax, in part, on the following:

(i) The receipts 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

(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(a) of the Tax Law provides, in part:

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 under section eleven hundred ten:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionary, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form . . . nothing herein shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

* * *

(3) Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five. . . are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax

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

Imposition. Sales tax is imposed on the receipts . . . from every sale of . . . food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers:

(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 all sandwiches and other food or drink unless the food or drink is sold in:

(i) an unheated state; and

(ii) 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.

Section 528.2 of the Sales and Use Tax Regulations provides, in part:

(a) Food and food products. (1) Food and food products, except candy and confectionery, when sold for human consumption, are exempt from sales and compensating use tax. . . .

(2) The terms food and food products as used in this section mean edible commodities whether prepared, processed, cooked, raw, canned or in any other form, which are generally regarded as food. This category includes, but is not limited to:

meat and meat products	jellying agents
milk products	fats, oils and shortenings
cereals and grain products	condiments
baked goods	spices
vegetables and vegetable products	sweetening agents
fruits and fruit products	food preservatives
poultry	food coloring
fish and seafood	frozen dinners
frozen entrees and desserts	snacks (except candy and confections)
*	*

(3) The phrase sold for human consumption means that the items sold are, in their normal use, regarded as being for human consumption. Pet foods, which are packaged, labeled or advertised as such, are not deemed sold for human consumption.

(b) Beverages, other than water.

* * *

(1) Beverages sold for human consumption are exempt from sales and compensating use tax, except for:

- (i) fruit drinks which contain less than 70 percent of natural fruit juices;
- (ii) soft drinks, sodas and beverages, such as are ordinarily dispensed at soda fountains (other than coffee, tea or cocoa);
- (iii) beer, wine and other alcoholic beverages.

(2) A beverage is a drink, whether sold in liquid form or otherwise.

* * *

(3) Fruit juices are exempt beverages. Fruit drinks, ades, nectars and cocktails which contain less than 70 percent natural fruit juices, are taxable.

(4) Soft drinks and sodas include carbonated and noncarbonated beverages, carbonated water, dietetic beverages and cocktail and other alcoholic drink mixes.

(5) Vegetable juices, whether made of a single vegetable, or a combination of vegetables, or a combination of a vegetable and other food product are exempt beverages.

Example: A juice composed of tomato juice and clam extract is exempt.

(c) Dietary foods and health supplements.

(1) 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.

(2) 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.

(d) Nothing contained within section 1115(a)(1) of the Tax Law or this section shall be construed as exempting food or drink from the tax imposed under subdivision (d) of section 1105 of the Tax Law. (See section 527.8 of this Title.)
. . . .

Section 528.4(b)(3) of the Sales and Use Tax Regulations provides:

Products consumed by humans for the preservation of health include other substances used internally or externally, which are not ordinarily considered drugs or medicines.

Example 1: Analgesics, antiseptics, antacids, cough and cold remedies, laxatives, aspirin, boric acid ointment, cod liver oil and castor oil are exempt.

Example 2: Antibiotics, sulfa drugs, and birth control pills are exempt.

Example 3: Insulin that is packaged with disposable syringes is exempt.

Example 4: Acne preparations, including acne soaps, are exempt provided they contain a recognized drug or medicine.

Example 5: All dandruff preparations, including dandruff shampoos, are exempt provided they contain a recognized drug or medicine.

Example 6: Any diagnostic drug, chemical or other substance which is used internally or externally on a human, such as a barium product for gastric X-rays, is exempt.

Example 7: Vaginal creams, foams, ointments, douches, jellies, powder, and sprays provided they function as treatments for specific conditions are exempt, but products that only deodorize are taxable.

Example 8: Foot powders that eliminate excessive perspiration and prevent athlete's foot or other fungus infections are exempt, but foot powders which act only as deodorants are taxable.

Example 9: Lip ice that treats or prevents chapped lips is exempt, but products that color the lips are taxable.

Example 10: Products used to kill lice which infest humans are exempt. Similar products which prevent or treat mange or ringworm in humans are also exempt.

Example 11: Products used for treatment of burns and products used to relieve pain from burns are exempt.

Example 12: Gelatin capsules, blood and its derivatives are exempt.

Example 13: Medical oxygen and nitrous oxide are exempt.

Opinion

Petitioner sells its wheat grass juice and vegetable juices in individual serving portions. The wheat grass juice is sold in an individual serving size container from which the patron can directly consume its contents. The vegetable juices are served in a cup. In both cases, the juices are generally consumed by Petitioner's patrons on Petitioner's premises immediately after their preparation. In some instances, a cover or lid may be provided for the container or cup so that the patron may remove the juice from Petitioner's premises.

Under Section 1115(a)(3) of the Tax Law, products consumed by humans for the preservation of health are exempt from sales and use tax. Section 1105(a) of the Tax Law imposes

TSB-A-02(25)S
Sales Tax
July 11, 2002

sales tax on the retail sale of tangible personal property. Section 1115(a)(1) of the Tax Law contains an exemption for “[f]ood, food products, beverages, dietary foods and health supplements” from such tax. Thus, when Section 1115(a)(3) exempts not only “[d]rugs and medicines intended for use . . . in the cure, mitigation, treatment or prevention of illnesses . . . in human beings,” but also “products consumed by humans for the preservation of health,” it is intended to cover products that preserve health in a manner similar to drugs and other medicines, but different from the manner in which food and food products preserve health. This means that the phrase “products consumed by humans” in Section 1115(a)(3) must be referring to products that preserve health other than through their nutrient value. Petitioner’s wheat grass juice and vegetable juices are not the type of items contemplated by the phrase “[p]roducts consumed by humans for the preservation of health” as described in Section 528.4(b)(3) of the Sales and Use Tax Regulations. Sales of such juices, therefore, are not exempt under Section 1115(a)(3).

Petitioner’s wheat grass juice and vegetable juices may, however, be exempt under Section 1115(a)(1) of the Tax Law. Petitioner’s products qualify as exempt beverages as described in Section 528.2(b)(5) of the Sales and Use Tax Regulations. Nevertheless, Petitioner’s sales of its products may be subject to sales tax under Section 1105(d) of the Tax Law. See Section 1115(a)(1) of the Tax Law and Section 528.2(d) of the Sales and Use Tax Regulations.

Section 1105(d)(i)(1) of the Tax Law provides that sales of food or drink are taxable in all instances where the sale is for consumption on the premises where sold. Section 1105(d)(i)(3) provides that sales of food or drink are taxable in those instances where the sale is for consumption off the premises of the vendor unless (other than sandwiches) 1) the food or drink is sold in an unheated state, and 2) the food or drink is 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.

Accordingly, all sales of wheat grass juice and vegetable juice for consumption on Petitioner’s premises are subject to sales tax. Sales of these beverages intended for consumption off Petitioner’s premises may be exempt provided that the conditions set forth in Section 1105(d)(i)(3) of the Tax Law are met. Petitioner should maintain records sufficient to independently verify each sale intended for consumption off of Petitioner’s premises. See Section 1132(c) of the Tax Law and Section 533.2 of the Sales and Use Tax Regulations. Petitioner’s sales of wheat grass juice and vegetable juice for off premises consumption in cups or similar containers do not appear to be sold in the same form and condition, quantities and packaging as in grocery stores or other establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten. It appears, therefore, from the facts in this Advisory Opinion that Petitioner’s sales of wheat grass juice and vegetable juice for off premises consumption do not satisfy the conditions of Section 1105(d)(i)(3) and are subject to sales tax.

If Petitioner’s sales of wheat grass juice and vegetable juices which are intended for off premises consumption meet the conditions set forth in Section 1105(d)(i)(3) of the Tax Law and

TSB-A-02(25)S
Sales Tax
July 11, 2002

Petitioner maintains records necessary to substantiate the exempt nature of each of those sales, Petitioner need not collect tax on such sales.

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