

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

TSB-A-02(55)S
Sales Tax
November 7, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010416A

On April 16, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from James Hannell d/b/a Jim Hannell's News, P.O. Box 7337, Albany, NY 12224. Petitioner, James Hannell d/b/a Jim Hannell's News, provided additional information pertaining to the Petition on 4/27/01 and 10/19/01.

The issue raised by Petitioner is whether his newsstand sales of food and drink items were for on premises consumption and, therefore, subject to sales tax.

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

Petitioner is a visually impaired person who operated a newsstand through a program made available by the Commission for the Blind and Visually Handicapped. The newsstand was on state owned property located in the Legislative Office Building, Empire State Plaza, Albany, New York. Petitioner paid no rent to the Commission for the use of the newsstand space, but paid it a fee which was a percentage of his income. Petitioner sold snacks, candy, soda, newspapers, etc. at the newsstand.

The newsstand adjoined a vending facility that consists of vending machines and tables and chairs. Petitioner did not own the vending machines or any of the products which they contain, but anticipated he would become responsible for the vending operation under the program with the Commission in 2002. The vending area was, however, available to Petitioner's customers for their use.

The newsstand was in a separate individual room. One large doorless entrance from the Legislative Office Building's hallway into the vending facility provided customer access to the newsstand. This access was gained through the newsstand's own sliding glass doors which remained open until Petitioner's close of business each day.

Petitioner charged sales tax on all taxable food and drink items and, due to the proximity of the tables and chairs in the adjoining vending area, on certain other food and drink items such as potato chips, fruit juice, and ice cream which would ordinarily be exempt if sold for off premises consumption. Recently, Petitioner stopped selling food and drink items at his newsstand.

Applicable Law and Regulations

Section 1105 of the Tax Law imposes sales tax, in part, on:

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

Section 1105(d)(i) of the Tax Law imposes sales tax on:

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 made through a vending machine that is activated by use of coin, currency, credit card or debit card (except the sale of drinks in a heated state made through such a vending machine) or 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:

(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:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (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. The food and drink excluded from the exemption provided by this paragraph under subparagraphs (i), (ii) and (iii) of this paragraph shall be exempt under this paragraph when sold for seventy-five cents or less through any vending machine activated by the use of coin, currency, credit card or debit card. With the exception of the provision in this paragraph providing for an exemption for certain food or drink sold for seventy-five cents or less through vending machines, nothing herein shall be construed as

exempting food or drink from the tax imposed under subdivision (d) of section eleven hundred five.

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

(a) *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.

* * *

(c) *Premises.* The term *premises* shall mean the total space and facilities in or on which the vendor conducts his business, including but not limited to . . . counter space, indoor or outdoor tables, chairs, benches and similar conveniences.

(d) *Consumption on premises.* The phrase *for consumption on the premises* shall mean that the food or drink sold may be consumed on the premises where the vendor conducts his business.

(e) *Consumption off premises.* The phrase *for consumption off the premises* shall mean that the food, including sandwiches, or drink is intended to be consumed at a place away from the vendor's premises.

* * *

(g) *Sales through vending machines.* (1) Vending machine operations carried on in premises where facilities such as tables, chairs, benches, counters, etc. are provided for customers are considered to be eating establishments selling food or

drink for on-premises consumption and sales made through such machines are taxable.

Opinion

Petitioner was engaged in the sale of candy, beverages, and snacks at the newsstand he operated under a program made available by the Commission for the Blind and Visually Handicapped. The newsstand was in close proximity to an adjoining vending facility that contains tables and chairs and was available to Petitioner's customers for their use.

Sales of food and drink are subject to the imposition of sales tax in all instances where the sales are for consumption on the premises where sold. See Section 1105(d)(i)(1) of the Tax Law. The exemption for certain food and drink contained in Section 1115(a)(1) of the Tax Law, e.g., potato chips, fruit drinks containing at least 70% of natural fruit juices, and ice cream, does not apply to sales of food and beverages where the sales are for consumption on the premises of the vendor where sold. See Section 1105(d)(i)(1) of the Tax Law.

Where food or drink sold may be consumed in or on the premises where a vendor conducts his business and facilities such as tables and chairs are provided for customers, the sales are deemed to be for on premises consumption. See Section 527.8(c) of the Sales and Use Tax Regulations. In this case, there is no access into or out of Petitioner's newsstand without walking into the vending area where the tables and chairs are located. The tables and chairs located in this common area are in close proximity to the newsstand location and the common area has been made available to Petitioner for use by his customers. Accordingly, all of Petitioner's sales of food and drink are considered to have been for consumption on the premises, subject to sales tax under Section 1105(d)(i)(1) of the Tax Law, and it was proper for him to charge tax on such items. See Sections 527.8(c) and (d) of the Sales and Use Tax Regulations.

DATED: November 7, 2002

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