

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-14(25)S
Sales Tax
July 22, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S131113A

On November 13, 2013, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether wasabi and soy seasoned almonds are subject to New York State and local sales and use tax.

We conclude that this product is exempt from sales and use tax under Tax Law § 1115(a)(1).

Facts

Petitioner operates a retail pharmacy and general merchandise chain that sells prescription drugs and a wide assortment of other products. One of the products it sells is Blue Diamond Bold Wasabi & Soy Almonds (hereinafter “Wasabi Almonds”).

The ingredients of the Wasabi Almonds, in the order listed on its package are: “almonds, vegetable oil (canola, safflower and/or sunflower), sugar, modified corn starch, salt, soy sauce (soybean, wheat, salt) horseradish, onion, spice, fractionated coconut oil and/or palm kernel oil, garlic, maltodextrin, yeast extract, natural flavor, citric acid, disodium guanylate and disodium inosinate.”

Petitioner asks whether the presence of sugar in the ingredients would make the Wasabi Almonds “candy and confectionery” and, therefore, excluded from the sales and use tax exemption for food and food products.

Analysis

Tax Law § 1105(a) imposes sales tax on receipts from the retail sale of tangible personal property. Tax Law § 1115(a)(1) exempts food and food products from sales tax. One of the exclusions from this exemption is “candy and confectionery.”

Sales and Use Tax Regulation § 528.2(a)(2) defines food and food products as “edible commodities” whether prepared, processed, cooked, raw, canned or in any other form, which are generally regarded as food. Food and food products include, as relevant here, snacks other than candy and confections.

Sales and Use Tax Regulation § 528.2(a)(4) provides that “[c]andy and confectionery include, without limitation, candy of all types . . . glazed or sugar-coated fruits, nuts, peanuts, popcorn, or other products . . . 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.”

Publication 840, “A Guide to Sales Tax for Drugstores and Pharmacies” identifies nuts and nut products and baked goods and snacks (except candy and confections) as exempt items.

We conclude that the Wasabi Almonds at issue here are not candy and confectionery. Generally, nuts, other than glazed or sugar coated nuts, are regarded as exempt food items. The nuts at issue here are not glazed or sugar coated. Rather, they are dusted with a wasabi and soy flavoring, which consists of a blend of sugar, vegetable oil, salt, soy sauce, horseradish, onion and other spices. The flavoring evokes a spicy, salty taste when consumed, rather than a sweet or sugary taste. These flavors are not typically associated with candy and confectionery. The addition of sugar does not automatically make a food product “candy or confectionery.” *See, e.g.*, TSB-A-09(38)S.

Furthermore, the product is not labeled as candy or confectionery. Instead, the label describes the nuts as “bold” and having “intense taste.” The label also includes the words “smart snacking” and a statement that consumption of a certain quantity of almonds “as part of a diet low in saturated fat and cholesterol may reduce the risk of heart disease.” These statements are not typically associated with candy or confectionery and demonstrate that the product is not regarded as candy or confectionery based on its normal use, as indicated on the label, or in its advertising. *See* Sales Tax Regulation § 528.2(a)(4)

Based on the above analysis, we conclude that Wasabi Almonds are not candy or confectionery, but rather are exempt food under Tax Law § 1115(a)(1).

DATED: July 22, 2014

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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.