

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

TSB-A-84(1)S
Sales Tax
February 16, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S830915A

On September 15, 1983 a Petition for Advisory Opinion was received from the New York State Beer Wholesalers Association, 7 Woodland Avenue, Larchmont, New York 10538.

The issue raised is whether the sale of containers and wooden boxes to retailers by wholesalers constitutes a taxable sale when such containers and boxes are used in the recycling of returnable cans and bottles.

Petitioner states that under the provisions of Section 367.5 of the Department of Environmental Conservation Rules and Regulations, promulgated pursuant to the New York State Returnable Container Act (ECL §27-1001 et. seq., the "Bottle Bill"), wholesalers are required to accept empty beverage containers from retailers. To allow proper handling, the regulations provide that wholesalers may require retailers to sort the containers.

In the transactions described by Petitioner, wholesalers will sell plastic bags and wooden boxes to retailers. The bags will be used to assist in counting, handling, sorting and transporting empty beverage containers. The individual retailer will fill the plastic bag, supported by the box, with up to 240 empty cans. Once a bag is filled by the retailer, it is closed and used to transport the empty containers back to the wholesaler. On receipt of a full bag, the wholesaler may either crush the containers, or simply ship them to the recycler in the bag used by the retailer.

It is Petitioner's contention that the sale of the bags and box to a retailer is not a sale to the ultimate consumer and therefore not within the purview of the Tax Law. Petitioner also contends that the bags sold by the wholesalers constitute "containers" and that sales of such bags are therefore exempt from sales tax under the provisions of Section 1115(a)(19) of the Tax Law.

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property" Section 1101(b)(4) of the Tax Law defines "retail sales" as: "...A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax..." under section 1105(c)(1),(2),(3) or (5) of the Tax Law.

Section 1115(a)(19) of the Tax Law exempts from tax receipts from the sale of "cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser." (Emphasis added)

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Because the sale of the bags and boxes to the retailer is not a sale for resale as such, nor for resale as a physical component part of tangible personal property, and as the bags and boxes are not purchased for use by the retailer in performing any of the services subject to tax under Section 1105(c) of the Tax Law, such sales constitute retail sales within the meaning of Section 1101(b)(4) of the Tax Law, and the receipts therefrom are subject to the sales tax imposed under Section 1105(a) of the Tax Law.

As the bags and box purchased by the retailer are not used by the retailer in packaging or packing tangible personal property for sale, the sale of such bags and boxes to the retailer does not qualify for the exemption provided for under Section 1115(a)(19) of the Tax Law.

DATED: January 18, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau