

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

TSB-A-90 (32) S
Sales Tax
June 29, 1990

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890920A

On September 20, 1989 a Petition for Advisory Opinion was received from McDonald's Restaurants of New York, Inc. McDonald's Plaza, Oak Brook, Ill. 60521.

The issue raised by Petitioner, McDonald's Restaurants of New York, Inc., is whether premiums (toys) purchased by McDonald's restaurants are purchased for resale.

Petitioner purchases various articles of tangible personal property in the form of premiums (toys) and theme boxes. These premiums are packaged with various combinations of food items which are referred to as "Happy Meals." The price of this "Happy Meal" package consists of the retail value of food items as stated on the menu board and the retail selling price of the premium and theme box. The price of the "Happy Meal" which includes the toy or premium, is greater than if each of the "Happy Meal" components were purchased separately. In addition, a restaurant can sell the premiums without the food components of the "Happy Meal" should the customer so desire. The premium is sold at retail at a 10 to 15% markup over its cost.

Generally, section 1105(a) of the Tax Law imposes a sales tax on receipts from every retail sale of tangible personal property unless otherwise excluded or exempted. Section 1101(b)(4)(i) defines "retail sale" as a "sale of tangible personal property to any person for any purpose, other than (A) for resale as such...". The effect of this provision is to remove property purchased for resale from the application of the sales tax imposed under Section 1105(a) of the Tax Law.

Section 1101(b)(5) of the Tax Law defines "sale" as any transfer of title or possession or both, exchange or barter, rental lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration...

Section 1105(d)(i) of the Tax Law provides in part:

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): . . .

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Tangible personal property purchased by a vendor and supplied to its customers as a component of its services to its customers is not purchased for resale within the meaning of section 1101(b)(4) of the Tax Law. Thus, it has been held that gas cylinders were not purchased for resale where the seller of the gas did not impose a separate charge for the use of its cylinders, but rather treated the cost as a cost of selling the gas itself. Albany Calcium Light, Inc. v. State Tax Commission, 44 NY2d 987 (1987). Moreover, the nominal demurrage charge imposed by the seller for the late return of cylinders was regarded by the court as merely incidental to the selling of the gases since the seller did not acquire the cylinders with the expectation of collecting these unusual charges.

Similarly, it has been held that where a vendor purchased trash containers for use as part of a trash removal service with no distinguishable consideration being paid by the customers of such service for the containers, such containers were not purchased for resale. U-Need-A-Rolloff Corporation, Dec St Tax Comm, January 20, 1984, TSB-H-84(16)S; aff'd U-Need-A-Rolloff Corporation v The New York State Tax Commission 67 NY2d 690, (1986). (See also: Amherst Cablevision, Inc., Dec St Tax Comm, September 19, 1980, TSB-H-80(208)S; Radiac Research Corp., Dec St Tax Comm, December 29, 1982, TSB-H-83(32)S; Laux Advertising, Inc. v. Tully, 67 A.D.2d 1066 (1979)).

Thus to qualify for resale, tangible personal property must be purchased with the intent to resell it as such and not to use it as a component of a service provided to a customer.

Since Petitioner purchases the premiums for use as advertising or promotional material, in connection with the sale of food and drink taxable pursuant to Section 1105(d)(i) of the Tax Law and not as tangible personal property to be resold as such or as a component of other tangible personal property pursuant to Section 1105(a) of the Tax Law, their purchase is not one for resale. However, in those unusual situations where a customer requests a premium without the purchase of a "Happy Meal", Petitioner would be required to collect the sales tax on such sale and it may apply for a credit for sales tax paid or use tax paid on the premium thus sold.

DATED: June 29, 1990

s\PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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