

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

TSB-A-02(1)S  
Sales Tax  
April 3, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001228A

On December 28, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from A. C. P. Services Corp., 800 Rt 245, Middlesex, New York 14507.

The issue raised by Petitioner, A. C. P. Services Corp., is whether a business that operates an open vending service is considered to be a vending machine operator under Section 1115(a)(1) of the Tax Law and therefore exempt from collecting sales tax on certain items sold for 75 cents or less.

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

Petitioner markets candy and snacks through an open vending service. The candy and snacks are made available to customers in open vending trays. Petitioner receives permission from business establishments to place its trays on the business' premises. Petitioner stocks the trays with candy and snacks for sale to customers. Customers deposit payment for the candy and snacks in a coin box located near the tray.

**Applicable Law**

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

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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. (Emphasis supplied)

### **Opinion**

Petitioner is in the business of marketing candy and snacks through an open vending service. The candy and snacks are made available for sale to customers in open vending trays. The trays are not coin activated machines. Customers simply take candy and snacks from a tray and deposit payment in the coin box. "In construing a taxing statute in order to determine what is included within its purview the rule is that the statute is to be strictly construed in favor of the taxpayer and against the taxing authority (*Matter of Nehi Bottling Co. v Gallman*, 39 AD2d 256, *affd* 34 NY2d 808; *Matter of American Locker Co. v Gallman*, 38 AD 2d 105, *affd* 32 NY2d 175). In construing a taxing statute in order to determine the scope of a statutorily prescribed exemption, however, the rule is that the exemptions are to be strictly construed and that if any ambiguity or uncertainty exists it is to be resolved in favor of the sovereign and against exemption (*Matter of Aldrich v Murphy*, 42 AD2d 385)." See *Matter of Airlift International, Inc. v State Tax Commission* 52 AD2d 688. The open vending trays used by Petitioner are not a vending machine for purposes of Section 1115(a)(1) of the Tax Law. Consequently, Petitioner's sales of candy and snacks from open vending trays are not eligible for the exemption under Section 1115(a)(1) for sales of food or drink at seventy-five cents or less through a vending machine.

DATED: April 3, 2002

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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