

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(16)S
Sales Tax
March 19, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071120B

On November 20, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Wal-Mart Stores East, LP, 702 S.W. 8th Street, Bentonville, AR, 72716-0555.

The issue raised by Petitioner, Wal-Mart Stores East, LP, is whether sales of Starbucks Frappuccino® coffee drink or Yoo-Hoo brand chocolate drink are subject to sales tax.

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

Petitioner's stores sell both Starbucks Frappuccino® coffee drink and Yoo-Hoo chocolate drink in bottles for off-premises consumption. A product label supplied by Petitioner for Starbucks Frappuccino® coffee drink lists as ingredients:

- Brewed Starbucks® coffee (water, coffee);
- reduced fat milk;
- sugar;
- cocoa;
- and various other ingredients.

A product label supplied by Petitioner for Yoo-Hoo lists as ingredients:

- water;
- high fructose corn syrup;
- whey (from milk);
- sugar;
- corn syrup solids;
- cocoa (alkali process);
- partially hydrogenated soybean oil;
- sodium caseinate (from milk);
- nonfat dry milk;
- salt;
- and various other ingredients.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

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

Section 1115(a) of the Tax Law provides, in part:

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. . . .

Section 528.2(b)(4) of the Sales and Use Tax Regulations provides:

Soft drinks and sodas include carbonated and noncarbonated beverages, carbonated water, dietetic beverages and cocktail and other alcoholic drink mixes.

Opinion

Petitioner's stores sell both Starbucks Frappuccino® coffee drink and Yoo-Hoo brand chocolate drink in bottles for off-premises consumption. Starbucks Frappuccino® coffee drink is, essentially, a flavored, cold coffee. Coffee is exempt from sales tax pursuant to section 1115(a)(1) of the Tax Law. Accordingly, sales of Starbucks Frappuccino® coffee drink as described in this Opinion are exempt from sales tax, as coffee qualifies as an exempt beverage. It should be noted that this Opinion makes no representation as to other Starbucks Frappuccino products.

Yoo-Hoo chocolate drink, although it contains some cocoa, is considered for sales tax purposes to be a noncarbonated, flavored soft drink. See *Taxable and Exempt Foods and Beverages Sold at Retail Food Markets and Similar Establishments*, Publication 880 (7/98). Therefore, Yoo-Hoo chocolate drink does not qualify for the exemption for food and beverages

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provided by section 1115(a)(1) of the Tax Law and sales of Yoo-Hoo are subject to sales tax under section 1105(a) of the Tax Law.

DATED: March 19, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.