

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

TSB-A-93 (25)S
Sales Tax
April 12, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930119B

On January 19, 1993, a Petition for Advisory Opinion was received from Toraya America Corporation, 300 East 85th Street, #1204, New York, New York 10028.

The issue raised by Petitioner, Toraya America Corporation, is whether the sale of food products containing beans, flour, rice powder, sweeteners and other flavors are "food" and, therefore, exempt from the imposition of sales and use tax pursuant to Section 1115(a)(1) of the Tax Law.

Petitioner intends to sell several Japanese specialty food products by mail and through retail sales in New York.

The following is a list of the products to be sold by Petitioner and their primary ingredients:

1. NamaKashi: A small baked or steamed cake containing flour, powdered rice, azuki bean paste, sweeteners and baking powder. They are traditionally served to guests on special occasions or given as special gifts.
2. Oshimono: A baked pastry containing potato starch and wasanbonto sugar.
3. Shiruko: Powders composed of azuki beans and shirozarato sugar, which, when mixed with hot water, form sweet, steamed soups.
4. Monaka: Azuki bean paste covered by thin rice wafers. Monaka refers to sweets made of azuki bean filling sandwiched between two thin crisp wafers, and shaped like chrysanthemum blossoms. Azuki bean paste is composed of azuki beans, water and shirozarato sugar.
5. Zangetsu : Shaped like a half moon, Zangetus are a small ginger flavored pancake made of rice powder folded over azuki bean paste.
6. Yokan and Mizu-Yokan: Gelatins made of azuki bean paste, water, shirozarato sugar and flavorings. They are wrapped in well-dried bamboo leaves and offered in a gift box.

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

(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 ...

Section 528.2(a) of the Sales and Use Tax Regulations provides, in part, as follows:

(1) Food and food products, except candy and confectionery, when sold for human consumption, are exempt from sales and compensating use tax.

(2) The terms "food" and "food products" as used in this section mean edible commodities whether prepared, processed, cooked, raw, canned or in any other form, which are generally regarded as food. This category includes, but is not limited to:

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| meat and meat products | jellying agents |
| milk products | fat, oil and shortenings |
| cereal and grain products | condiments |
| baked goods | spices |
| vegetables and vegetables products | sweetening agents |
| fruits and fruit products | food preservatives |
| poultry | food coloring |
| fish and seafood | frozen dinners |
| frozen entrees and desserts | snacks (except candy and confections) |

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(4) Candy and confectionery include, without limitation, candy of all types, chocolate (plain or mixed with other products); glazed or sugar-coated fruits, nuts, peanuts, popcorn or other products; chewing gum; mints; lollypops, fruit flavored sticks, fruit drops, licorice, pastilles; cotton candy, marshmallow; marzipan, halvah and similar products regarded as candy or confectionery based on its normal use or as indicated on the label or the advertising thereof.

Namagashi, oshimono, shiruko, monaka, zangetsu, yokan and mizu-yokan constitute food and food products within the meaning and intent of Section 1115(a)(1) of the Tax Law and Section 528.2(a)(2) of the Sales and Use Tax Regulations. They are not a candy or confectionery as defined

TSB-A-93 (25)S
Sales Tax
April 12, 1993

in Section 528.2(a)(4) of said Regulations. Therefore, pursuant to Section 1115(a)(1) of the Tax Law the receipts derived from the sales of said food and food products are exempt from the imposition of sales and use taxes.

DATED: April 12, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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