

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

TSB-A-83(33)S
Sales Tax
July 6, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S820930A

On September 30, 1982 a Petition for Advisory Opinion was received from The Southland Corporation, 425 Cherry Street, Bedford Hills, New York 10507.

The issue raised herein is whether the electricity used to power frozen food processors (Slurpee machines) in a retail food store is subject to sales tax.

The frozen food processor combines flavored syrup, carbon dioxide and water into a frozen product. This product is a carbonated beverage sold in either a frozen or semi-frozen state, delivered to the purchaser in a coated paper or plastic cup.

Section 1105(d) of the Tax Law imposes a sales tax on "the receipts from every sale of . . . any . . . drink of any nature . . . when sold in or by restaurants, taverns, or other establishments in this state . . . :

(1) in all instances where the sale is for consumption on the premises where sold;

...

(3) in those instances where the sale is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten."

Accordingly, sales of the product of the Slurpee machine are subject to the sales tax imposed under section 1105(d) of the Tax Law. Burger King v. State Tax Commission, 51 N.Y. 2d 614; 20 NYCRR 527.8(c), (d), (e)(2)(iv) Ex. 4.

Section 1115(c) of the Tax Law provides for an exemption from sales tax with respect to electricity used or consumed directly and exclusively in the production of tangible personal property for sale. However, the proposition that food and drink sold by a restaurant or other establishment which is subject to tax under section 1105(d) of the Tax Law is not "tangible personal property" for purposes of the Tax Law is well established. Burger King v. State Tax Commission, 51 N.Y. 2d 614. Accordingly, electricity used to power Slurpee machines, which produce a drink the sale of which is subject to tax under section 1105(d) of the Tax Law, does not come within the exemption provided for under section 1115(c) of the Tax Law. The purchases of such electricity are therefore subject to sales tax, pursuant to section 1105(b) of the Tax Law.

DATED: June 10, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau