



New York Association of Convenience Stores
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Ms. Maryann Tucker
Director, Legislative Affairs
NYS Department of Taxation & Finance
Building 9, Harriman Office Campus
Albany NY 12227

Dear Maryann:

I thank you and your colleagues for taking part in a conference call with Scott Wexler and myself on August 13 to discuss the definition of gross sales as it pertains to the new tobacco registration fees.

As requested, I am following up with a list of questions and issues we believe need to be carefully examined, decided, and disseminated to the regulated community well in advance of the statutory September 20 due date for renewal applications and fee payments.

FRANCHISE FOOD OPERATIONS: Food service is a growing product category for many supermarkets and convenience stores. Some lease space inside their store to a franchise food operation (i.e. Dunkin Donuts, Pizza Hut). In some cases the rent is per square foot. In others, the store gets a percentage of the food franchise's sales. How much, if any, of the separate food entity's gross sales count toward the registered convenience store's gross sales for registration fee purposes?

BOTTLE DEPOSITS: When they receive deliveries of soft drinks or beer, retailers pay their supplier a nickel deposit on each container. In turn, they collect a nickel deposit from the consumer. When the empty container is returned, the retailer gives the customer the nickel back, and recovers the nickel from their supplier. If the container is not returned, however, the beverage supplier retains the nickel. The retailer does not keep it. The deposit money passes through the retail store, but none of it sticks. Are bottle deposits collected by the retailer treated as gross sales? The same question applies to deposits on beer kegs, propane barbecue tanks, and any rental equipment the retail location may carry.

LOTTERY SALES: Lottery retailers are required to maintain a dedicated bank account for lottery receipts, separate and apart from the store's operating account. This Lottery Division regularly sweeps this account via electronic funds transfer. The store gets to keep a flat 6% commission on the face value of all lottery sales. The pass-through nature of the other 94% would suggest that lottery should not be included in the gross sales calculation.

MOTOR FUEL: In our opinion, motor fuel should be removed from any gross-sales tally used to determine tobacco registration fee. It is uniquely worthy of exclusion because of this combination of factors:

- It accounts for two-thirds of the typical convenience store's total gross sales, according to the 2007 State of the Industry Report published by the National Association of Convenience Stores.

- Its extreme price volatility distorts gross sales as a measure of the location's business activity. One year, the average price of a gallon of gas may be \$2, and the following year it may be \$4. This could inflate or deflate the registration fee, as shown in the following illustration:

	Hypothetical Store	Year X	Year Y
A	Fuel Gallons Sold (@ 30k gal per mo)	360,000	360,000
B	Average Pump Price	\$4.00	\$2.00
C	Annual Fuel Sales (A times B)	\$1,440,000	\$720,000
D	Annual Inside Sales	\$250,000	\$250,000
E	Total Gross Sales (C plus D)	\$1,690,000	\$970,000
F	Tobacco Registration Fee	\$2,500	\$1,000

Does the Department believe the Legislature intended for a convenience store's tobacco registration fee to rise and fall year-to-year according to the price volatility of one product unrelated to tobacco that is sold outside the four walls of the store?

There are precedents in existing New York statute for excluding petroleum products from the calculation of gross sales for regulatory purposes.

DTF Form CG-80-I, "Application for Registration as a Chain Store Pursuant to Tax Law Article 20-A, Cigarette Marketing Standards Act," notes that one of the ways in which a retail establishment can qualify to register as a chain store is to be a "large volume outlet operator." Section 483 of the Tax Law defines this as "any person or persons who sell cigarettes at one or more retail outlets each of which had annual gross sales in the previous calendar year of more than two million dollars excluding petroleum products in this state."

In addition, Section 251-z-12 of the Agriculture and Markets Law, imposing a food safety training requirement upon licensed food service establishments, specifically exempts independent stores having "annual gross sales in the previous calendar year of less than \$3 million, excluding petroleum products."

Finally, tobacco products are not offered for sale at gas pumps, the vast majority of which are self-serve. Tobacco products are not displayed there, and there is no cashier there to check ID. Moreover, in accordance with the Department's licensing policy, the business would be required to obtain a separate registration if they wanted to sell tobacco products from the gas pump island.

TAXES: State and local taxes currently account for one-third to one-half of the retail price of a pack of cigarettes, while at least 20% of the selling price of motor fuel is state and local taxes. These taxes artificially inflate the retailer's gross sales, which in turn inflates the fee calculation.

We would argue that the pass-through nature of taxes collected for and remitted to the state and localities should be excluded from the gross sales calculation.

CAR WASH: If a convenience store operates a coin-operated or automatic car wash on the same parcel as the store, is the revenue from the car wash included in the calculation of gross sales? The car wash is not within the premises registered with the Tax Department. The car wash is outside the four walls of the store. In fact, a separate registration fee would be due if a convenience store wished to sell tobacco products from the car wash facility.

MDA SHAMROCKS: Convenience stores from time to time will sell event tickets or accept donations on behalf of a charitable or community organization. An example is the Muscular Dystrophy Association “shamrocks” you can buy in March for \$1 at the counter and have displayed on the wall of the store with your name on it. Should receipts from such activity benefiting charitable organizations be treated as gross sales for purposes of calculating the registration fee?

Clearly, there are legitimate issues surrounding what constitutes gross sales for purposes of calculating the tobacco registration fee under the enacted 2009-10 state budget. We look forward to working with you to resolve these issues in a reasonable manner and ensure that the regulated community is fully and timely informed. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "James S. Calvin". The signature is written in dark ink and is positioned to the left of the typed name.

James S. Calvin
President