

STATE OF COLORADO

DEPARTMENT OF REVENUE
State Capitol Annex
1375 Sherman Street, Room 409
Denver, Colorado 80261
Phone (303) 866-3091
FAX (303) 866-2400



John W. Hickenlooper
Governor

Barbara J. Brohl
Executive Director

GIL-13-028

November 27, 2013

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Bagged or Packaged Salads

Dear XXXXXXXXXX,

You submitted on behalf of a XXXXXXXXXXXXX ("Company") a request for guidance to determine the taxability of bagged or packaged salads.

The Colorado Department of Revenue ("Department") issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issues and is not binding on the Department. A private letter ruling provides a specific determination for a specific set of facts, is binding on the Department but not on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department regulation 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department initially treats your request as one of a general information letter. If you would like the Department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with regulation 24-35-103.5. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not a determination of the tax consequence of any particular action or inaction.

Issue

Are certain refrigerated bagged or packaged salads sold by Company exempt from Colorado sales and use tax as food?

Background

Company sells certain refrigerated bagged or packaged salads at retail stores in Colorado. Several bagged salads consist of one or more varieties of lettuce and may include additional vegetables but do not include salad dressing or utensils. These bagged salads are advertised as ready to eat, and, depending on the salad, Company states that the

contents are triple washed. There are also bagged salads kits that include lettuce, vegetables, fruit, nuts, crisp noodles, and salad dressing but no utensils. Lastly, there are packaged salads in the shape of a bowl that consist of lettuce, vegetables and salad dressing and include a utensil, and may include meat.

Discussion

Food sold for domestic home consumption is exempt from sales and use taxes levied by the State of Colorado.¹ State-administered local tax jurisdictions have the choice to tax food.² Colorado defines "food" by adopting the definition of food used by the U.S. Department of Agriculture's (USDA) Supplemental Nutrition Assistance Program (SNAP) and Woman, Infants and Children (WIC) Program.³ Colorado incorporates these federal requirements and limitations in its regulation of food.⁴

Food is defined under federal law⁵ (and, therefore, under Colorado law for sales and use tax purposes), which states, in pertinent part:

(1) any food or food product for home consumption except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption other than those authorized pursuant to clauses (3), (4), (5), (7), (8), and (9) of this subsection;

...

In addition to this federal requirement, Colorado has, by statute, excluded "prepared salads" from the definition of food.⁶

As an initial matter, we note that exemptions from tax are narrowly construed.⁷ Unless the exemption clearly applies, the exemption must be denied.

It appears that the bagged salads that do not include salad dressing or utensils would qualify as food for home consumption. These salads still require some level of

¹ §39-26-707, C.R.S.

² §29-2-105, C.R.S. For a list of cities, counties, and special districts and the taxability of food in those jurisdictions, go to www.Colorado.gov/revenue/tax and click on Forms > Sales Forms > DR 1002.

³ See, §39-26-102(4.5), C.R.S. and 7 U.S.C. §2012(k)

⁴ With respect to dietary supplements, Department regulation 39-26-102.4.5(b)(9) states that "These products [vitamins, minerals and other dietary deficiency correctors] serve as supplements to food or food products rather than as food and, therefore, are not eligible for the food exemption. Because essential vitamins and minerals occur naturally in foods, a good diet will include a variety of foods that together will supply all nutrients needed. Since these products serve as deficiency correctors or therapeutic agents to supplement diets deficient in essential nutrition rather than as foods, they are not eligible." The distinction here can be difficult to apply. Because of this difficulty, and as discussed in footnote 7, below, the USDA now relies on the Federal Drug Administration (FDA) label selected by the manufacturer to make this distinction.

⁵ 7 U.S.C. §2012(k)

⁶ §39-26-102(4.5)(a), C.R.S.

⁷ *Security Life & Accident Co. v. Heckers*, 177 Colo. 455, 495 P.2d 225, 226 (1972). *Regional Transp. Dist. v. Charnes*, 660 P.2d 24, 25 (Colo. App. 1982).

preparation because no dressing is included and consumers would not, presumably, eat the lettuce and vegetables out of the bag. Thus, we would not view these as prepared salads. Moreover, the product is commonly understood to be used for home consumption as opposed to immediate consumption.

Bagged salad that contains all the ingredients of a prepared salad, including the salad dressing, is likely a "prepared salad" within the meaning of the statutory term. Although it may be the case that this prepared salad is commonly understood to be consumed at home and an exempt "food", it is not exempt because of the express statutory exclusion for prepared salads from the definition of "food".

The packaged salad in the shape of a bowl that contains a variety of lettuce, vegetables, salad dressing, a utensil, and may include meat is a "prepared salad" (and, therefore, not "food") but also appears to be made for immediate consumption. Under either rationale, this product is not "food" eligible for the food exemption.

Lastly, it is worth restating that the Department is not making and cannot make a specific determination as to whether these products are exempt or taxable in the context of a general information letter.

Miscellaneous

This letter represents the good faith opinion of Department personnel who are knowledgeable on state taxes issues. However, the Department does not make a specific determination here on any of the issues raised and the Department is not bound by this general information letter.

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by home-rule cities and home-rule counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado/revenue/tax for more information about state and local sales taxes.

Enclosed is a redacted version of this letter. Pursuant to statute and regulation, this redacted letter will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted letter.

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue
Tele: (303)866-5627
Email: neil.tillquist@state.co.us