

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

December 20, 2011

XXXXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXXXXXX,

XXXXXXXXXXXXXXXXXXXX submitted on behalf of XXXXXXXXXXXXXXX ("Company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Regulation 24-35-103.5. This letter is the Department's private letter ruling.

Issue

Are Product 1, Product 2, Product 3 and Product 4 exempt from Colorado sales and use tax because they qualify as a "food?"

Conclusion

Product 1, Product 2, Product 3, and Product 4 qualify as "food" and, therefore, are exempt from state sales and use taxes if sold for domestic home consumption. These products are subject to local sales taxes of those local jurisdictions that have elected to levy sales and use taxes on food, unless the products are purchased with food stamps of WIC funds.

Background

Company manufactures a number of food and nutritional products, including XXXXXX [complete, balanced nutrition] ("Product 1"), XXXXXX [targeted, specialized nutrition] ("Product 2"), XXXXXXXXXXXXXXX ("Product 3"), and XXXXXXXXXXXXXXXXXXXXXXX ("Product 4")

Product 1

Product 1 is a complete nutrition shake that has a milkshake-like consistency and comes in a variety of flavors. Company markets this product as a meal or used as an ingredient in various recipes published by Company. Product 1 carries a "Nutrition Facts" label and not a "Supplement Facts" label. Company does not describe the

Facts” label and not a “Supplement Facts” label. Company does not describe the product as intended to increase vitamin or caloric intake nor as a nutritional supplement or as an adjunct.

Product 2

Product 2 is a shake described as having a milkshake-like consistency and flavor and marketed as providing focused nutritional benefits. Product 2 contains specialized ingredients intended to support a particular nutritional need (immune health, bone health, etc.). Product 2 is not designed to provide general nutritional supplementations but, rather, is intended to be consumed as a meal or as an ingredient in recipes. Product 2 carries a “Nutrition Facts” label, not a “Supplement Facts” label, and does not describe the product as a nutritional supplement or adjunct.

Product 3

Product 3 is a line of shakes designed for people with diabetes. This product is not designed to increase or decrease particular levels of vitamins, minerals, calories or proteins, but is formulated so that the carbohydrates are digested slowly so the product does not cause a spike in blood sugar spike. Product 3 carries a “Nutrition Facts” label and not a “Supplement Facts” label.

Product 4

Product 4 comes in both powder and liquid forms and is marketed to be consumed by athletes after a workout or training session. Product 4 is intended to help build muscles and aid in muscle recovery after a workout. Product 4 carries a “Nutrition Facts” label and does not contain a “Supplement Facts” label.

Discussion

“Food” sold for domestic home consumption is exempt from sales and use tax levied by the State of Colorado and certain state-administered local tax jurisdictions.¹ 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, Infant and Children (WIC) Program.² These federal programs exclude supplements from the definition of food.³ Colorado incorporates these federal requirements and limitations in its regulation of food, which expressly excludes dietary supplements from the definition of food.⁴

¹ §39-26-707, C.R.S. (food exemption)

² See, §39-26-102(4.5), C.R.S. and 7 U.S.C. §2012(g) and 42 U.S.C. §1786, respectively.

³ <http://www.fns.usda.gov/snap/retailers/eligible.htm>. *How FNS Determines Product Eligibility for SNAP Purchase* and <http://www.fns.usda.gov/wic/benefitsandservices/foodpkgregs.htm> Regulatory Requirements for WIC-Eligible Foods (Medical Foods)

⁴ 39-26-102.4.5(b)(9) (“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. Because

A supplement is defined under federal law⁵ (and, therefore, under Colorado law for sales and use tax purposes), as follows:

(1) means a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

- (A) a vitamin;
- (B) a mineral;
- (C) an herb or other botanical;
- (D) an amino acid;
- (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
- (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E);

(2) means a product that—

- (A) ...is intended for ingestion...
- (B) is not represented for use as a conventional food or as a sole item of a meal or the diet; and
- (C) is labeled as a dietary supplement.

To determine whether an item qualifies as food, the USDA relies⁶ on the food label required by the FDA. Items that carry a “Nutrition Facts” label qualify as food under the SNAP and WIC programs. A “dietary supplement” carries a “Supplement Facts” label and states that it is a “dietary supplement” on the front of the product. Therefore, food items that carry a “Nutrition Facts” label qualify as “food” for Colorado sales and use tax purposes and food items that carry the “Supplement Facts” label are dietary supplements and do not qualify as “food” for purposes of the Colorado sales tax exemption.

You have represented that Products 1 through 4 carry “Nutrition Facts” labels and not “Supplement Facts” labels. Because the USDA treats these items as “food” under the

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.”)

⁵ 21 U.S.C. §321(ff)

⁶ The FDA advised the department that the manufacturer is responsible for determining which label (Nutrition label v. Supplement label) is appropriate for its product. That is, the FDA accepts the election made by the manufacturer for purposes of determining whether the item falls within the definition of “food” for the SNAP and WIC programs. See, FDA website cited in footnote 2 for a discussion of FDA policy.

SNAP and WIC programs, these items are “food” for Colorado state and state-administered sales and use tax purposes.⁷

Although not specifically addressed in your letter, we want to bring to your attention the determination of local taxes and special district taxes due on food items. Cities and counties have the option of taxing food.⁸ If they exempt food from their sales tax they must use the same criteria used by the state in determining which items are taxable and which are exempt.⁹ For example, food for domestic home consumption purchased in Salida is exempt from state sales and use tax, but is subject to Salida’s sales tax because the city does not exempt sales of food.

You can refer to Colorado Sales/Use Taxes (DR 1002) to determine whether a city or county taxes food. This publication, updated every January and July, indicates which statutory cities, counties, and special districts have a sales tax exemption for food. The publication can be found on our Web site at www.TaxColorado.com > Forms. Contact home-rule cities to find out if they exempt food from sales tax.

The Department also administers the sales and use tax for special districts, which include the Regional Transportation District, Scientific and Cultural Facilities District, Metropolitan Football Stadium District, and rural transportation authorities. For more information about special districts for which the department administers their taxes, see Department publication 1002. These special districts exempt the same items that are taxed at the state level. Therefore, Products 1 through 4 are exempt from taxes levied by these districts.

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. You may wish to consult with home rule cities and counties which administer their own sales or use taxes about the applicability of their taxes.

This ruling is premised on the assumption that the Company has completely and accurately disclosed all material facts. The department reserves the right, among others, to independently evaluate Company’s representations. This ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling 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 version of the ruling.

⁷ Had we independently reviewed whether these products are dietary supplements, we may have concluded that some were dietary supplements, particularly Product 4. However, Colorado’s statutory definition of food is controlled by how the federal programs define food.

⁸ §29-2-105, C.R.S. (local tax jurisdiction’s option to exempt food sales)

⁹ §29-2-105(8), C.R.S. (local tax jurisdiction that exempt food sales must use state’s definition of “food”).

Sincerely,

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