

# 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

PLR-12-006

December 12, 2012

XXXXXXXXXXXXXXXXXX  
ATTN: XXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXX ("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.

## Issues

1. Do Product 1 and Product 2 qualify as food and are therefore exempt from Colorado sales and use tax?
2. What is the tax treatment of bundled transactions that contain both taxable and nontaxable goods?

## Conclusion

1. Product 1 and Product 2 qualify as food and are exempt from Colorado sales and use tax.
2. The tax treatment of a bundled transaction depends on the items in the bundle, the value of the items and whether the items are separable.

## Background

Company produces what it has characterized as food replacements and dietary supplements. The following is a description provided by Company about each of the two products.

### XXXXXXXXXXXX ("Product 1")

1. Has a Nutrition Facts Label
2. Is meant as a meal replacement rather than a supplement to a meal

3. Is for home consumption because it must be prepared with other liquids, mixers, flavors, etc.
4. May be purchased with food stamps or EBT cards
5. Is a powdered food drink mix
6. Is a dietary food / health food item

XXXXXXXXXXXXXXXXXX ("Product 2")

1. Has a Nutrition Facts Label
2. Is meant as a meal replacement rather than a supplement to a meal
3. Is for home consumption
4. May be purchased with food stamps or EBT cards
5. Is a dietary food / health food item

### Discussion

Food sold for domestic home consumption is exempt from sales and use taxes levied by the State of Colorado.<sup>1</sup> State-administered local tax jurisdictions have the choice to tax food.<sup>2</sup> Colorado defines "food" by adopting the definition of food used by the U.S. Department of Agriculture's (USDA) Supplemental Nutrition Assistance Program (SNAP, previously known as the Food Stamp program) and Woman, Infants and Children (WIC) Program.<sup>3</sup> These federal programs exclude dietary supplements from the definition of food.<sup>4</sup> Colorado incorporates these federal requirements and limitations in its regulation of food.<sup>5</sup>

Food is defined under federal law<sup>6</sup> (and, therefore, under Colorado law for sales and use tax purposes), as follows:

- (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;

---

<sup>1</sup> §39-26-707, C.R.S.

<sup>2</sup> §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](http://www.Colorado.gov/revenue/tax) and click on Forms > Sales Forms > DR 1002.

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

<sup>4</sup> <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).

<sup>5</sup> 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.

<sup>6</sup> 7 U.S.C. §2012(k)

- (2) seeds and plants for use in gardens to produce food for the personal consumption of the eligible household;
- (3) in the case of those persons who are sixty years of age or over or who receive supplemental security income benefits or disability or blindness payments under title I, II, X, XIV, or XVI of the Social Security Act, and their spouses, meals prepared by and served in senior citizens' centers, apartment buildings occupied primarily by such persons, public or private nonprofit establishments (eating or otherwise) that feed such persons, private establishments that contract with the appropriate agency of the State to offer meals for such persons at concessional prices, and meals prepared for and served to residents of federally subsidized housing for the elderly;
- (4) in the case of persons sixty years of age or over and persons who are physically or mentally handicapped or otherwise so disabled that they are unable adequately to prepare all of their meals, meals prepared for and delivered to them (and their spouses) at their home by a public or private nonprofit organization or by a private establishment that contracts with the appropriate State agency to perform such services at concessional prices;
- (5) in the case of narcotics addicts or alcoholics, and their children, served by drug addiction or alcoholic treatment and rehabilitation programs, meals prepared and served under such programs;
- (6) in the case of certain eligible households living in Alaska, equipment for procuring food by hunting and fishing, such as nets, hooks, rods, harpoons, and knives (but not equipment for purposes of transportation, clothing, or shelter, and not firearms, ammunition, and explosives) if the Secretary determines that such households are located in an area of the State where it is extremely difficult to reach stores selling food and that such households depend to a substantial extent upon hunting and fishing for subsistence;
- (7) in the case of disabled or blind recipients of benefits under title I, II, X, XIV, or XVI of the Social Security Act, or are (1) individuals described in paragraphs (2) through (7) of subsection (r) of this section, who are residents in a public or private nonprofit group living arrangement that serves no more than sixteen residents and is certified by the appropriate State agency or agencies under regulations issued under section 1616(e) of the Social Security Act [42 U.S.C. 1382e(e)] or under standards determined by the Secretary to be comparable to standards implemented by appropriate State agencies under such section, meals prepared and served under such arrangement;
- (8) in the case of women and children temporarily residing in public or private nonprofit shelters for battered women and children, meals prepared and served, by such shelters;
- (9) in the case of households that do not reside in permanent dwellings and households that have no fixed mailing addresses, meals prepared for and served by a public or private nonprofit establishment (approved by an appropriate State or local agency) that feeds such individuals and by

private establishments that contract with the appropriate agency of the State to offer meals for such individuals at concessional prices.

To determine whether an item qualifies as food, USDA relies on the food label required by the FDA.<sup>7</sup> 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 explicitly 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 the Colorado sales tax exemption.

You have represented that Products 1 and 2 bear “Nutrition Facts” labels and not “Supplement Facts” labels. Because USDA treats these items as “food” under the SNAP and WIC programs, these items are “food” for Colorado state and state-administered sales and use tax purposes. If the USDA alters this classification system for food, then this ruling is accordingly and automatically amended.

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.<sup>8</sup> 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.<sup>9</sup> 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 Tax Rates (DR 1002)<sup>10</sup> 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.colorado.gov/revenue/tax](http://www.colorado.gov/revenue/tax) > Forms > Forms by Number. Contact home-rule cities to find out if they exempt food from sales tax.

The Department also administers the sales and use taxes for special districts, which include the Regional Transportation District, Scientific and Cultural Facilities District and Rural Transportation Authorities. For more information about these special districts, see Department Publication DR 1002. These special districts exempt the same food items that are exempt at the state level. Therefore, Product 1 and 2 are exempt from taxes levied by these special districts.

---

<sup>7</sup> 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.

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

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

<sup>10</sup> See, footnote 2.

### *Bundled Sales*<sup>11</sup>

Company also asks about the taxability of transactions involving a single price for a bundle of taxable and non-taxable items – specifically, about the taxability of kits that contain both exempt food products and taxable dietary supplements. In general, sales tax is calculated on the entire purchase price when a retailer bundles the sale of both taxable and non-taxable items for one price. Sales tax is calculated on only the taxable item if the price for the exempt item is separately stated and is separable from the sale of the taxable item. This is known as the Separate Statement Rule<sup>12</sup> and is adopted by many states. For example, if a retailer sells a kit that contains taxable cosmetics and a gift certificate for exempt spa services, then sales tax is calculated on the entire purchase price if the prices for each are not separately stated, but only on the price of the cosmetics if the price is separately stated.

However, there is an exception to this general rule. A retailer selling both taxable and non-taxable items for a single price can pay use tax on the taxable item and sell the exempt items without charging sales tax if the price of the taxable item is *de minimis*. For example, if the price of a kit in which the exempt items are sold is *de minimis*, and the retailer does not separately state on the invoice the price for the kit and the price of the exempt items, then the retailer should pay use tax on the kit and sell the kit without charging sales tax. Although the Department has not formally addressed what constitutes *de minimis* price, the Department will treat *de minimis* as taxable items whose retail price is ten percent or less than the total retail sales price of the bundled goods. See e.g., Ark. Regs. GR-93(D)(2)(a) (De Minimis Exclusions for Bundled Transactions); Ky. Rev. Stat. Ann. § 139.215(4)(e) [Eff. 7-1-09]. (Taxation of Bundled Transactions). Use tax is calculated based on the cost to the retailer of purchasing the kit from the supplier. *International Business Machines v Department of Revenue*, 601 P.2d 622 (Colo. 1979).

### **Miscellaneous**

This ruling applies only to sales and use taxes administered by the Department. Please note that the Department administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and 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.gov/revenue/tax](http://www.colorado.gov/revenue/tax) for more information about state and local sales taxes.

---

<sup>11</sup> Given the nature of Company's business (manufacturing products rather than the sale of services) we assume that bundled sales involve the sale only of tangible personal property. We do not address here sales of taxable goods bundled with non-taxable services. In bundled property/service transactions, our analysis would likely include a discussion of the true object test.

<sup>12</sup> See, Hellerstein, *State Taxation* (WG&L), 1J17.12 (The Separate Statement Rule); Department Private Letter Ruling 10-001; *A.D. Stores v Department of Revenue*, 19 P.3rd 680 (Colo. 2001) (separately stated charges for separable are not subject to tax).

This ruling is premised on the assumption that 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.

Sincerely,

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