

STATE OF COLORADO

DEPARTMENT OF REVENUE
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Governor

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Executive Director

GIL-13-017

May 14, 2013

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Seeds and Plants, Food and Dietary Supplements, Medical Supplies, Test Kits, and a Coupon Book

Dear XXXXXXXXXXXX,

XXXXXXXXXXXX ("Company") submitted on behalf of your client ("Retailer") a request for guidance to determine the applicability of Colorado sales and use tax on certain seeds and plants, food and dietary supplements, medical supplies, test kits, and a coupon book.

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

1. Are vegetable or fruit seeds, flower seeds, fruit trees and vegetable plants subject to Colorado taxes?
2. Are blood glucose tablets subject to Colorado taxes?
3. Are Products subject to Colorado taxes?
4. Are glucose monitoring strips subject to Colorado taxes?
5. Are reagent strips for urinalysis subject to Colorado taxes?

6. Are home pregnancy test kits subject to Colorado taxes?
7. Are ovulation test kits subject to Colorado taxes?
8. Is a coupon book subject to Colorado taxes?

Background

Company is a tax services firm that provides comprehensive state, local, federal, and international tax advisory and consulting services on a multi-jurisdictional basis. Retailer sells a number of products and Company is inquiring about the tax obligation for each product.

The following facts are provided by Company:

1. The blood glucose tablets in question are labeled with a Nutrition Facts panel.
2. XXXXXXXXXXXX ("Products") encompass several different products and comes in a number of different forms. Products are used to prevent dehydration in children by replenishing minerals and nutrients lost during illness. Products are not labeled with FDA Drug Facts panel, Supplement Facts panel or Nutrition Facts panel.
3. Reagent strips for urinalysis are used as a glucose monitoring devices to detect protein and fats in the urine.
4. The coupon book contains tear-out coupons redeemable at local establishments such as restaurants, hotels, entertainment centers, etc. Upon redeeming these coupons at the local establishments, customers are given a discount by the local establishments on goods or services rendered (i.e., two meals for the price of one, an additional free night's stay at a hotel, reduced admission fees to a theater, etc.)

Discussion

Colorado imposes sales and use tax on the sale, use, storage, and consumption of tangible personal property.¹ There are several exemptions that may be applicable here.

Vegetable and Fruit Seeds, Flower Seeds, Fruit Trees and Vegetable Plants
Section 39-26-716, C.R.S. exempts a variety of tangible personal property used in commercial agricultural operations, such as farm equipment, dairy equipment, pesticides, and drugs and agricultural compounds used in the care and treatment of livestock. Included this list of exempt items are:

- (4)(b) All sales and purchases of feed for livestock, all sales and purchases of seeds, and all sales and purchases of orchard trees and the storage, use, or consumption of such property.

The exemptions listed under §39-26-716, C.R.S. are intended to encompass specific exemptions for commercial agriculture and livestock operations. If these seeds and

¹ §39-26-104 and 202, C.R.S. (sales and use tax apply to the sale, use, storage, or consumption of tangible personal property). You can view this and other statutes, regulations, and Department publications by visiting our web site at www.colorado.org/revenue/tax > Tax Library.

plants are being used in a commercial agricultural operation, whether the seeds are food-producing or not, then the seeds are exempt from state or state-collected local sales or use taxes under §39-26-716.4(b), C.R.S..² Seeds and orchard trees that are not used for a commercial agricultural purpose are not exempt. This is consistent with Colorado's tax treatment of seeds and plants as food. The definition of food sold for domestic home consumption, which is exempt from tax, excludes seeds and plants to grow food.³

Blood Glucose Tablets

Colorado defines food by adopting the definition of food used by USDA's SNAP and WIC programs. These federal programs exclude dietary supplements from the definition of food.⁴ Colorado incorporates these federal requirements and limitations in its regulation of food.⁵

To determine whether an item qualifies as food, USDA relies on the food label required by the FDA.⁶ 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. Generally, 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. However, the Department has serious reservations about whether blood glucose tablets constitute food. These tablets are primarily used to regulate blood sugar levels and not as a food source. In addition, many other brands of glucose tablets carry a "Supplement Facts" label rather than a "Nutrition Facts" label.

Products

Items without a nutrition or supplement facts label can have a determination made by USDA by submitting a complete product package or sample of the item(s) requested by mail or email to:

² Department Publication FYI Sales 64, "Sales Tax Exemptions on Seeds, Plants and Trees."

³ §39-26-102(4.5), C.R.S.

⁴ <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).

⁵ 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.

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.

Chief
Retailer Management and Issuance Branch
Benefit Redemption Division
Supplemental Nutrition Assistance Program
USDA, Food and Nutrition Service
3101 Park Center Drive, Room 404
Alexandria, VA 22302
OR EMAIL TO: BRDHQ-WEB@fns.usda.gov

Depending on USDA's determination, the Department may revisit this issue if the product clearly does not constitute a food, food product or meal replacement.

Glucose Monitoring Devices, Reagent Strips for Urinalysis, Home Pregnancy Test Kits, Ovulation Test Kits

Colorado exempts certain drugs, medical equipment and supplies from state and state-administered sales and use taxes. Among those exempt items are:

- (a) All sales of prescription drugs dispensed in accordance with a prescription by a licensed provider or furnished by a licensed provider as part of professional services provided to a patient or client;
- (b) All sales of insulin in all its forms dispensed pursuant to the direction of a licensed provider;
- (c) All sales of glucose useable for treatment of insulin reactions;
- (d) All sales of urine- and blood-testing kits and materials;
- (e) All sales of insulin measuring and injecting devices, including hypodermic syringes and needles;

...
(h)

- (I) All sales of medical, feeding, and disposable supplies, including any related accessories, for incontinence, infusion, enteral nutrition, ostomy, urology, diabetic care, and wound care dispensed pursuant to a prescription.
- (II) For purposes of this paragraph (h), "prescription" means any order in writing, dated and signed by a licensed physician, physician's assistant, or advanced practice nurse with prescriptive authority, or given orally by such a person and immediately reduced to writing by the pharmacist, assistant pharmacist, or pharmacy intern, or by a representative of a business licensed to sell items described in subparagraph (I) of this paragraph (h) so long as such order is also followed by an electronic submission of the order to the business, specifying the name and address of the person for whom an item described in subparagraph (I) of this paragraph (h) is ordered and directions, if any, to be included with such item.⁷

⁷ §39-26-717, C.R.S.

More specifically, Department Publication FYI Sales 68, "Medical and Dental Supplies and Equipment," states that,

"The following fall under the definition of blood or urine tests, which are exempt:
chemstrip
dextrostix strips
glucostix
hematest
microstix
multistix
pregnancy test
pregnosticon test"

Additionally, glucose monitoring supplies that do not qualify for an exemption under the definition of blood and urine tests are exempt when sold pursuant to a prescription and meet the necessary requirements listed under §39-26-717, C.R.S..

Coupon Book

The Department has no publication, regulation, or statute that addresses the issue of sales of coupon books. However, a number of states treat the sale of a coupon book as a non-taxable sale because the coupons represent an intangible right to purchase merchandise at some future time and do not represent the purchase of tangible personal property. However, the Department does not make the determination whether coupon books are exempt or taxable in the context of a general information letter. The Department notes that some coupons books are more than simply a collection of coupons and contain significant information about the retailer, such as menus. This information itself is of value to the customer and suggests that the book may be more properly viewed as a physical book and not simply an intangible right to discounts. We also note that if a vendor is reimbursed, in full or in part, for the value of the coupon, the reimbursement amount will also be subject to sales tax.⁸ If you would like a determination on this issue, please request a private letter ruling by resubmitting a request and fee in compliance with Department Regulation 24-35-103.5.

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-

⁸ See, Illinois Private Letter Ruling No. ST 92-0029-PLR, 1/13/1992; California Sales and Use Tax Annotation No. 280.0000. 280.0523, "Entertainment Books;" Iowa Admin. Code 701--213.14 (423), "Redemption of meal tickets, coupon books and merchandise cards as a taxable sale;" Wisconsin Sales and Use Tax Report No. 3-72, 09/01/1972.

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.gov/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
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Email: neil.tillquist@state.co.us