

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2015-14ST
January 15, 2016

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ISSUES

Sales and Use Tax - Exemptions Applicable to Sales of Food

Authority: [IC 6-2.5-1-16](#); [IC 6-2.5-1-20](#); [IC 6-2.5-2-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-5-20](#); Sales Tax Information Bulletin #29 (February 2012)

A company ("Taxpayer") is seeking a determination regarding whether its products are exempt from Indiana gross retail and use tax as food or food ingredients.

STATEMENT OF FACTS

Taxpayer is a California business that sells: protein shakes and snacks; vitamins and nutritional supplements; sports, energy, and fitness drinks; and skin and hair products. Most of their products either contain a "nutrition facts" label or a "dietary supplement facts" label. Taxpayer provides the following information regarding these labels as it pertains to its products:

Conventional foods are foods that are not dietary supplements. A dietary supplement, as defined by Congress in the Dietary Supplement Health and Education Act (SHEA) of 1994, is a product taken by mouth that is intended to supplement the diet and that contains one or more "dietary ingredients." The "dietary ingredients" in these products may include:

- Vitamins
- Minerals
- Herbs or other botanicals
- Amino acids
- Other substances found in the human diet, such as enzymes

Pursuant to FDA regulation, dietary supplements must be labeled as such and must not be represented for use as a conventional food or as the sole item of a meal or the diet. One way to distinguish dietary supplements from conventional foods is by looking at the nutrition information on the label of the product. Conventional foods must have a "Nutrition Facts" panel on their labels, but dietary supplements must have a "Supplements Facts" panel. The products [at issue] have nutritional labels, as regulated by the FDA, as opposed to a supplemental label.

Additionally, Taxpayer sells its products via a network of independent distributors, and collects sales tax on distributor orders at suggested retail price on taxable products, remitting the tax to the Department on behalf of its distributors.

DISCUSSION

Taxpayer requests that the Department determine whether sixteen of its products are considered nontaxable "food or food ingredients."

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [IC 6-2.5-2-1\(a\)](#). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. [IC 6-2.5-2-1\(b\)](#). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." [IC 6-2.5-3-2\(a\)](#).

In general, all purchases of tangible personal property are subject to sales and/or use tax unless an enumerated exemption from sales and/or use tax is available. [IC 6-2.5-5-20\(a\)](#) provides that "[s]ales of food and food ingredients for human consumption are exempt from the state gross retail tax." [IC 6-2.5-1-20](#) defines "food and food ingredients" to mean:

. . . substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value. The term does not include alcoholic beverages, candy, dietary supplements, tobacco products, or soft drinks.

[IC 6-2.5-1-20](#) makes clear that dietary supplements, as well as candy and soft drinks, are specifically excluded from the definition of "food and food ingredients for human consumption," and thus are not exempt from sales and use tax. Therefore, if the products at issue meet the statutory definition of a dietary supplement, or candy or soft drinks, purchases of these items would not fall under the food and food ingredient exemption and would be subject to sales and use tax.

The definition of dietary supplements is found at [IC 6-2.5-1-16](#), which states that a dietary supplement is:

[A]ny product, other than tobacco, that:

- (1) is intended to supplement the diet;
- (2) contains one (1) 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 humans to supplement the diet by increasing the total dietary intake;or
- (F) a concentrate, a metabolite, a constituent, an extract, or a combination of any ingredient described in this subdivision;
- (3) is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and
- (4) is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label and as required under 21 CFR 101.36.

Taxpayer correctly notes that if a product has a "Nutrition Facts" label, it is not a dietary supplement, because if it were a dietary supplement, the product would have had the required "Supplemental Facts" label. Further, if a product does not have a "Supplemental Facts" label on it, it is not, for sales and use tax purposes, a dietary supplement. However, even if one of the products is not a dietary supplement, it does not mean it is automatically a non-taxable food item. Nor does the presence of a "Nutrition Facts" label automatically mean an item is a non-taxable food item, because "candy" and "soft drinks" have "Nutrition Facts" labels, but are not exempt food items. Therefore, the Department must look at the labels provided and determine whether Taxpayer's products are candy, soft drinks, or a non-taxable food item.

[IC 6-2.5-1-12](#) defines "candy" as follows:

"Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. The term does not include any preparation:

- (1) containing flour; or
- (2) requiring refrigeration.

[IC 6-2.5-1-26](#) defines "soft drinks" as follows:

"Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. The term does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or greater than fifty percent (50%) of vegetable or fruit juice by volume.

With regards to the specific products, the Department will briefly address the taxability of each product in the order in which they were presented by Taxpayer:

- Aloe concentrate: This product is a liquid beverage that contains maltodextrin, a sweetener, and the label does not state the volume of vegetable or fruit juice. This is a soft drink, and therefore **taxable**.

- Aloe concentrate with mango flavoring: This product is a liquid beverage that contains maltodextrin and sucralose, which are sweeteners, and the label does not state the volume of vegetable or fruit juice. This is a soft drink, and therefore **taxable**.
- Herbal tea concentrate with peach flavoring: This product is a liquid beverage that contains fructose and maltodextrin, which are sweeteners. This is a soft drink, and therefore **taxable**.
- Protein powder: This product is an **exempt** food ingredient. Although it contains sweeteners, it is neither a soft drink, as it is not a liquid beverage, nor a candy, as it is not in bar, drop, or piece form.
- Protein bar with citrus lemon flavoring: This product does not appear to contain flour, and it contains multiple sweeteners. Therefore, it meets the definition of candy, and is **taxable**.
- Protein drink mix with vanilla flavoring: Drink mixes are an **exempt** food ingredient. Although it contains sweeteners, it is neither a soft drink, as it is not a liquid beverage, nor a candy, as it is not in bar, drop, or piece form.
- Orange fitness drink: This product is a liquid beverage that contains sugar and sucralose, which are sweeteners. This is a soft drink, and therefore **taxable**.
- Meal shake with vanilla flavoring: Although this product is a liquid beverage that contains sweeteners, it is not a soft drink because it contains milk and milk substitutes. As such, this product is an **exempt** food.
- Roasted soy nuts with chile lime flavoring: This product contains sugar combined with nuts. This is a candy, and therefore **taxable**.
- Roasted salted soy nuts: This specific product is an **exempt** food, as it contains no sweeteners, sugar, or honey.
- Drink mix with wild berry flavoring: Drink mixes are an **exempt** food ingredient. Although it contains sweeteners, it is neither a soft drink, as it is not a liquid beverage, nor a candy, as it is not in bar, drop, or piece form.
- Chocolate shake: Although this liquid beverage product contains sweeteners, it is not a soft drink because this product contains milk and milk substitutes. As such, this product is an **exempt** food.
- Peanut butter protein bar: Because this product contains flour, this is not a candy. As such, this product is an **exempt** food.
- Cookies and cream meal bar: Because this product contains flour, this is not a candy. As such, this product is an **exempt** food.
- Vanilla almond protein bar: This product does not appear to contain flour, and it contains sweeteners. Therefore, it meets the definition of candy, and is **taxable**.
- Soup mix creamy chicken: This specific product is an **exempt** food ingredient, as it contains no ingredients that would exclude it from the definition of a "food ingredient."

RULING

Some of Taxpayers products are exempt food or food ingredients, but many of the products are candy or soft drinks, which are not subject to the Indiana sales and use tax exemption under [IC 6-2.5-5-20](#). Taxpayer must therefore collect sales tax on the sale of those items to its Indiana distributors.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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