



COLORADO
Department of Revenue

Taxation Division

Physical Address:
1375 Sherman Street
Denver, CO 80203

Mailing Address:
P.O. Box 17087
Denver, CO 80217-0087

GIL-16-010

June 23, 2016

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Custom Herbal Formulas

Dear XXXXXXXXXXXXX,

You ("Taxpayer") submitted a request for guidance regarding the applicability of sales tax on custom herbal formulas acupuncturists create and sell.

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, but 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 Rule 1 CCR 201-1, 24-35-103.5 at www.colorado.gov/pacific/tax/letter-rulings

The Department treats this request as a general information letter. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not binding on the Department. If Company would like the Department to issue a private letter ruling on the issue raised here, Company can submit a request and pay the fee in compliance with Department Rule 1 CCR 201-1, 24-35-103.5.

Issue

Do custom herbal formulas Taxpayer prepares and sells qualify for exemption from sales tax as prescription drugs, nonprescription drugs, or materials furnished by a licensed provider?

Background

Taxpayer is an acupuncturist licensed by the Department of Regulatory Agencies and a Chinese herbalist practicing in Colorado. Taxpayer prepares and sells custom herbal formulas to clients. The custom herbal formulas are prepared for the specific condition of the individual client, are assembled from Taxpayer's extensive inventory of Chinese herbs, and may each contain anywhere from two to twenty herbs. Taxpayer requests guidance

regarding the taxability of these custom herbal formulas and their potential eligibility for the sales tax exemption for prescription drugs.

Structure of Analysis

To determine whether custom herbal formulas are subject to tax, the Department will examine the following questions:

1. Do the herbal formulas Taxpayer prepares and sells qualify for exemption under § 39-26-717(1)(a) or (k), C.R.S.?
 - a. Is Taxpayer a "licensed provider" as defined by § 39-26-717(3), C.R.S.?

Discussion

Colorado imposes sales tax on the sale of tangible personal property.¹ However, a number of medical products are exempt from the tax.² Specifically exempted from taxation under § 39-26-717(1)(a) or (k), C.R.S. 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;"* (emphasis added)

*"(k) All sales of nonprescription drugs or materials when furnished by a **licensed provider** as part of professional services provided to a patient;"* (emphasis added)

While it is unclear whether the custom herbal formulas Taxpayer prepares are prescription drugs, nonprescription drugs, or materials as these terms are used in statute, they are nonetheless ineligible for this exemption. Drugs, whether prescription or nonprescription, and materials qualify for the exemption only if they are furnished or prescribed by a licensed provider. For the purpose of the exemption, "licensed provider" is defined as a "person authorized to prescribe drugs under the provisions of title 12, C.R.S."³ Acupuncturists are licensed under title 12, but they are not authorized to prescribe drugs.⁴ The "practice of acupuncture" may include "the recommendation of herbs and dietary guidelines."⁵ Acupuncturists may also procure, but not prescribe, certain substances used in injection therapy.⁶⁷ However, acupuncturists are not authorized to practice medicine.⁸

¹ § 39-26-104(1)(a), C.R.S.

² § 39-26-717, C.R.S.

³ § 39-26-717(3), C.R.S.

⁴ § 12-29.5-101, et seq., C.R.S.

⁵ § 12-29.5-102(3.5)(a), C.R.S.

⁶ § 12-29.5-102.5(2), C.R.S.

⁷ Despite the actions acupuncturists are permitted to perform, they are not authorized by statute to prescribe drugs. By contrast, several other professions are explicitly granted (sometimes limited) prescriptive authority. "A licensed dentist is authorized to prescribe drugs or medicine." § 12-35-114, C.R.S. "The [state] board [of nursing] may authorize an advanced practice nurse...to prescribe controlled substances or prescription drugs." § 12-38-111.6, C.R.S. A licensed physician "may delegate to a physician assistant licensed by the board...the authority to prescribe medication, including controlled substances, and dispense only such drugs as designated by the board." § 12-36-106(5), C.R.S.

⁸ § 12-29.5-102(3.5)(b), C.R.S.

Furthermore, the Department of Regulatory Agencies states explicitly that licensed acupuncturists may not prescribe a prescription drug or controlled substance.⁹

Consequently, the custom herbal formulas Taxpayer prepares and sells do not qualify for sales tax exemption as a prescription or nonprescription drug.

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.gov/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,

Ken Schade
Colorado Department of Revenue
Office of Tax Policy & Analysis

⁹ https://www.colorado.gov/pacific/dora/Pharmacy_Prescriptive_Authority