



COLORADO

Department of Revenue

Taxation Division

Office of Tax Policy
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DOR_TaxPolicy@state.co.us

GIL-15-019

June 8, 2015

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Nonessential Food Articles

Dear XXXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXX (“Company”) a request for guidance to determine whether certain food items are nonessential food articles or containers.

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 Regulation 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department treats this request as one for 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 a retailer would like the Department to issue a private letter ruling on the issue raised here, the retailer can resubmit a request and fee in compliance with Department Regulation 24-35-103.5.

Issue

1. Are the sale of individually wrapped butter pads, jelly packages, half & half creamers and similar items exempt as food or taxable as nonessential food items?
2. Does the method by which a single serve item is provided to the end-user affect the taxability of the item from the wholesaler to retailer?
3. Is it true food items purchased in volume are eligible for the food exemption whereas single serve condiments are not? For example, is a jar of jelly placed on a restaurant table for customer use exempt as food but individually sized jelly packages are taxable?

Background

Company makes wholesale sales of food, beverage, and related supply items to retail foodservice establishments that operate both dine-in and quick-service restaurants or both. Company represents that the taxability of nonessential food items are regularly contested by Company’s customers (retail foodservice establishments).

At times, single serve condiments are provided by our foodservice customers to the end user in a number of ways, including:

1. In the bag as a component of their prepared food sale to go.
2. At convenience bars for the customer's use.
3. At the tables of their dine-in facilities.

The statement of basis and purpose published by the Department on Regulation 39-26-707.1 indicates that the taxability of nonessential food items is associated with these items being supplied at convenience counters. However, the manner in which these items are transferred to the customer varies by retailer. Company represents that as a wholesaler, the administrative burden of applying sales tax based on the manner by which a retail foodservice establishment transfers nonessential food items would amount to an unmanageable task.

Discussion

Food sold for domestic home consumption is exempt from sales and use taxes levied by the State of Colorado.¹ However, food or drink served or furnished in or by restaurants or other similar places of business where prepared food or drink is regularly sold is subject to sales tax.² Because Company is a wholesaler to restaurants and other like places of businesses, the items sold to such entities will never be eligible for the food exemption because the food or drink these entities sell will not meet the definition of food.³ Therefore, the only question to consider is whether certain items, articles, or containers provided by a restaurant or other similar place of business are nonessential.

Colorado also levies tax on purchases made by restaurants or other similar places of business for any article, bag, or container that is nonessential to the food, meal, or beverage purchased by a customer of the restaurant or similar place of business.⁴ The Department considers an article or container to be nonessential if it is primarily used for the convenience of the consumer and is not necessary to transfer the food, meal, or beverage to the consumer.

Condiments that are not incorporated into a prepared meal at the time it is transferred to the consumer but that are provided separately, regardless of the method by which they are provided to the customer of the restaurant or other similar place of business, are nonessential food articles. As such, any purchase made by a restaurant or other similar place of business for individually wrapped butter pads, jelly packages, half & half creamers and similar items are nonessential food articles subject to tax when acquired from a wholesaler. In addition, when a restaurant or other similar place of business provides jelly in a jar, rather than individually wrapped packages, for customer's use or convenience, such jelly appears to be a nonessential food article subject to tax because it is not incorporated into the prepared meal at the time it is transferred to the customer.

The Department has previously provided guidance that items sold in bulk to restaurants or other similar places of business are essential food items. The Department took and continues to take this position because it assumes that items purchased in bulk are generally incorporated into the final food, meal, or beverage sold to a customer. However, here, where the wholesaler is aware that the items will not be incorporated into the food, meal, or beverage sold by the restaurant or similar place of business, the wholesaler must collect tax on such items when the restaurant or similar place of business makes such purchase.

Miscellaneous

¹ §§ 39-26-707(1)(e) and 39-26-102(4.5), C.R.S.

² § 39-26-104(1)(e), C.R.S.

³ § 39-26-102(4.5), C.R.S.

⁴ §§ 39-26-707(1)(c) and (d), C.R.S.

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,

Office of Tax Policy
Colorado Department of Revenue