



**COLORADO**

**Department of Revenue**

Taxation Division

Office of Tax Policy  
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Denver, CO 80217-0087

DOR\_TaxPolicy@state.co.us

PLR-16-013

April 25, 2016

XXXXXXXXXXXXX  
Attn: XXXXXXXXX  
XXXXXXXXXXXXX  
XXXXXXXXXXXXX

Re: Food and Nutritional Products

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXX ("company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Department Rule 24-35-103.5. This letter is the Department's private letter ruling. This ruling is binding on the Department to the extent set forth in Department Rule 24-35-103.5. This ruling cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

**Issues**

Are Products 1, 2, 3, 4, 5, and 6 (described below) subject to tax?

**Conclusion**

Products 1-6 are exempt from Colorado sales tax as food.

**Background**

Company is located outside of Colorado and is a multi-level marketing company that sells its products exclusively to and through a network of independent distributors. Company collects sales tax on distributor orders based off the suggested retail prices of the taxable products and remits the tax on behalf of its distributors. Company's products have two types of product labels: Nutrition Facts and Supplement Facts. All products in question have Nutrition Fact labels, the determination of which is regulated by the U.S. Food and Drug Administration.

XXXXXXXXXXXXXXXXX ("Product 1") contains aloe and is purported to soothe the stomach, supports nutrient absorption, and intestinal health. Product 1 is a liquid that can be drunk straight or mixed with water or juice. Product 1 has a Nutrition Fact label.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX ("Product 2") is a concentrated version of Product 1. Product 2 must be mixed with water or juice before drinking. Product 2 has a Nutrition Fact label.

XXXXXXXXXXXXXXXXXXXX ("Product 3") is a powder drink mix of Product 1. Product 3 must be mixed with a beverage before drinking. Product 3 has a Nutrition Fact label.

XXXXXXXXXXXXXXXXXXXX ("Product 4") is a powder drink mix that contains soluble and insoluble fiber. Product 4 must be mixed with a beverage before drinking. Product 4 has a Nutrition Fact label.

XXXXXXXXXXXXXXXXXXXX ("Product 5") is a protein bar that has a Nutrition Facts label.

XXXXXXXXXXXXXXXXXXXX ("Product 6") is a packet of roasted soy nuts that has a Nutrition Facts label.

### **Structure of Analysis**

To determine whether Company's products are subject to tax, the Department will examine the following questions:

1. Is the item taxable under § 39-26-104(1), C.R.S.?
  - a. Is the item tangible personal property sold or purchased at retail?
  - b. Is the item food or drink served or furnished in or by restaurants, cafes, lunch counters, cafeterias, hotels, social clubs, nightclubs, cabarets, resorts, snack bars, caterers, carryout shops, and other like places of business?
2. Is the item eligible for any exemptions?
  - a. Is the item exempt under § 39-26-707, C.R.S.?
    - i. Is the item "food" as defined in § 39-26-102(4.5), C.R.S.?

### **Discussion**

Colorado levies sales tax on the sale of tangible personal property. Products 1, 2, 3, 4, 5, and 6 are tangible personal property. Products 1, 2, 3, 4, 5, and 6 are not sold at restaurants or like businesses because they are sold exclusively through a network of independent distributors. Therefore, the question at issue is whether Products 1, 2, 3, 4, 5, and 6 are "food" as defined in § 39-26-102(4.5), C.R.S.

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

Food is defined as:

- (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;

To determine whether an item qualifies as food, USDA relies on the food label required by the Federal Drug Administration ("FDA"). 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 items that carry the "Supplement Facts" label are dietary supplements and do not qualify as "food" for the Colorado sales tax exemption.

Pursuant to the definition of dietary supplement, the product has to be labeled as such. Company represents that Products 1, 2, 3, 4, 5, and 6 bear "Nutrition Facts" labels and not "Supplement Facts" labels. Because Products 1-6 bear a "Nutrition Facts" label, the USDA treats these items as "food" under the SNAP and WIC programs. Thus, 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.

State-administered cities and counties have the option of taxing food. 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. 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) 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. 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. These special districts exempt the same food items that are exempt at the state level. Therefore, Products 1 - 6 are exempt from taxes levied by these special districts.

### **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/tax](http://www.colorado.gov/tax) for more information about state and local sales taxes.

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. The ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling and is subject to modification or revocation in accordance to Department Regulation 24-35-103.5.

This ruling is binding on the Department to the extent set forth in Department Regulation 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

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,

Office of Tax Policy  
Colorado Department of Revenue