



COLORADO

Department of Revenue

Taxation Division

Office of Tax Policy
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PLR 23-003

June 14, 2023

XXXXXXXXXX
XXXXXXXXXX
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XXXXXXXXXX

Via Electronic Mail: XXXXXXXXXXXX

Re: Sales and Use Tax on Food for Home Consumption

Dear XXXXXXXXXXXX:

You submitted a request for a private letter ruling on behalf of XXXXXXXXXXXX (“Company”), regarding the sales and use tax on food for home consumption, to the Colorado Department of Revenue (“Department”) pursuant to 1 CCR 201-1, 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 1 CCR 201-1, Rule 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Issue

Whether the food products sold by Company are food for home consumption that is exempt from state sales and use tax.

Conclusion

Yes, the food products sold by Company are food for home consumption and are therefore exempt from state sales and use tax.

Background¹

The Company is a remote seller of food products and has no physical presence in Colorado. The Company does not have any retail locations.

The Company is not a restaurant, café, lunch counter, cafeteria, hotel, social club, nightclub, cabaret, resort, snack bar, caterer, carry out shop or similar place of business. It is also not a pushcart, motor vehicle, or other mobile facility. The food products are not sold from a location

¹ Paragraph (4)(b)(ii) of 1 CCR 201-1, Rule 24-35-103.5 requires the request for a private letter ruling to include a statement of facts. This section generally recites the statement of facts provided in the request, which is not an indication that the Department found such facts relevant to its analysis. Some relevant facts may be omitted to ensure confidentiality as required by section 24-35-103.5(5), C.R.S. The terms used in this section to describe the factual background are generally those of the requester.

in Colorado that has a kitchen or that actively sells food on a to-go basis such as a salad bar, kiosk, or grocery store location. The food products are also not sold by a meal preparation kitchen where a customer may walk in and either prepare their own food or have someone prepare the food for them. The food products are not sold with utensils.

The food products sold by the Company are purchased from an independent third party on a per unit basis and resold to its customers through the Company's website. The food products are pre-cooked, packaged, and shipped to the Company's customers by the third party. The third-party purchases all the food and food ingredients and then creates the food products with its own employees located outside Colorado. Once the food products have been cooked and cooled by the third party, the food products are then air-chilled and packaged with an attached nutrition label (which follows U.S. Food and Drug Administration standards) and placed in insulated packaging with cold-packs for shipment to a customer's mailing address through postal services. The food products are not delivered by an on-demand delivery service.

Typical food products include a meat or plant-based protein, vegetables, and whole grains and do not include prepared salads. The Company's website lists several different meal plans that offer variations based on the customer's specific dietary needs or preferences. Customers are not able to request custom food products.

The Company's food products are not intended for, nor are they marketed for, immediate consumption and require further preparation to be eaten as intended. Instructions are provided to customers to prepare the food by stovetop, oven, or microwave.

Discussion

Colorado generally imposes a sales tax on retail sales of tangible personal property.² The term "tangible personal property" means "corporeal personal property," and generally embraces all goods, wares, merchandise, products and commodities, and all tangible or corporeal things and substances that are dealt in and capable of being possessed and exchanged.³ Because food is tangible personal property, it is subject to state sales and use tax unless a specific exemption applies.

Colorado exempts the sale and use of food,⁴ which is defined as "food for home consumption as defined in 7 U.S.C. sec. 2012 (k), as amended, for purposes of the federal food stamp program."⁵ The food stamp program referred to in Colorado statute is the U.S. Department of Agriculture's (USDA) Supplemental Nutrition Assistance Program (SNAP). SNAP defines "food" as "any food or food product for home consumption except . . . hot foods or hot food products ready for immediate consumption. . . ."⁶ The Secretary of Agriculture further describes "eligible food" under SNAP as "[a]ny food or food product intended for human consumption except . . . hot foods and hot food products prepared for immediate consumption. . . ."⁷ According to the

² Section 39-26-104(1)(a), C.R.S.

³ Section 39-26-102(15)(a)(I), C.R.S.

⁴ Section 39-26-707(1)(e) and (2)(d), C.R.S.

⁵ Section 39-26-102(4.5)(a), C.R.S.

⁶ 7 U.S.C. § 2012(k).

⁷ Paragraph (1) of the definition of "eligible food" in 7 C.F.R. § 271.2.

federal Food and Drug Administration (FDA), food products intended for human consumption and offered for sale, not including food for immediate consumption, must include nutrition labeling.⁸

Because of Colorado's reliance on the USDA's definition of food for purposes of the sales and use tax exemption, the exemption for food generally includes food sold for home consumption, but the exemption for food does not include prepared food or food for immediate consumption. Food sold for home consumption includes, among other things, meat, poultry, fish, bread, cereals, vegetables, and fruits.⁹ However, Colorado specifically excludes prepared salads and salad bars, packaged and unpackaged cold sandwiches, and deli trays from the definition of food.¹⁰

Prepared food or food marketed for immediate consumption, and therefore not exempt, includes food that is hot at the point of sale, food kept above room temperature to make it palatable and suitable for immediate consumption, food marketed to be heated on the premises whether or not hot at the point of sale.¹¹

The Company is a remote seller of food products that are pre-cooked, packaged with an attached FDA-approved food label, and shipped to the Company's customers by a third party. Typical food offerings include a meat or plant-based protein, vegetables, and whole grains, and do not include prepared salads or cold sandwiches. The food products require further preparation to be consumed as intended.

The Company's food products are food for home consumption and are not prepared food or food marketed for immediate consumption. Therefore, the Company's food products are exempt from the state sales and use tax.

The Colorado Revised Statutes authorize cities, towns, counties, and certain types of special districts to impose a sales tax.¹² These sales taxes are collected, administered, and enforced by the Department in the same manner as the state sales tax.¹³ In most cases, these local sales taxes are imposed upon the same property and services subject to the state sales tax.¹⁴ Cities, towns, and counties are, however, permitted to deviate from the state sales tax base with respect to certain exemptions.¹⁵ Food for home consumption is one of the local option exemptions.¹⁶ Therefore, the Company will need to determine whether state-administered local governments have adopted this exemption in calculating any local tax due. The Company can

⁸ 21 C.F.R. § 101.9(a) and (j).

⁹ Paragraphs (1)(c)(4), (1)(c)(6), and (1)(c)(9) of 1 CCR 201-4, Rule 39-26-102(4.5).

¹⁰ Section 39-26-102(4.5)(a) C.R.S.

¹¹ Paragraph (1)(c)(4) of 1 CCR 201-4, Rule 39-26-102(4.5).

¹² Section 29-2-102, C.R.S. (regarding incorporated towns and cities); 29-2-103, C.R.S. (regarding counties). The taxing authority for those entities that the Department refers to generally as "special districts" is found in the statutes permitting the establishment of the entity. See, e.g., section 32-9-119(2)(a), C.R.S. (empowering the board of the Regional Transportation District to impose a sales tax); 32-13-107(1)(a), C.R.S. (same with respect to the board of the Scientific and Cultural Facilities District); 43-4-605(1)(j)(I) (same with respect to regional transportation authorities).

¹³ Section 29-2-106, C.R.S. For special districts, refer to the enabling statutes as described in note 12, above.

¹⁴ Section 29-2-105, C.R.S. (with respect to cities and towns). For special districts, refer to the enabling statutes as described in note 12, above.

¹⁵ Section 29-2-105(1)(d), C.R.S.

¹⁶ Section 29-2-105(1)(d)(I)(C), C.R.S.

utilize the state-supplied geographic information system (<https://tax.colorado.gov/GIS-info>) to search for rate and taxability information (select “food for home consumption” from the product list). Local exemption information is also available in Department publication DR 1002.

Miscellaneous

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts, that all representations are true and complete, and that Company has otherwise complied with the requirements of section 24-35-103.5, C.R.S., and the rules promulgated pursuant thereto. The Department reserves the right, among others, to independently evaluate Company’s facts, representations, and assumptions. The ruling is null and void if any such fact, representation, or assumption is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is binding on the Department and is subject to modification or revocation, in accordance with 1 CCR 201-1, Rule 24-35-103.5.

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by self-collected home-rule cities. You may wish to consult with those local governments that administer their own sales or use taxes about the applicability of those taxes. Visit our website at tax.colorado.gov for more information about state and local sales taxes.

Thank you for your request.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.