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Georgia Letter Ruling SUT No. 2013-10-24-01 Food

This letter is in response to your request for guidance on the application of Georgia sales and use tax to sales of certain juice chewables and nutrition bars.

Facts

Taxpayer requests a formal ruling on the taxability of its juice chewables and nutrition bar products. Taxpayer has provided copies of the product labels to assist in the ruling. All product labels provide “Nutrition Facts”. None of the product labels provide “Supplement Facts”.

Issue

Are Taxpayer’s juice chewables and nutrition bar products subject to Georgia sales and use tax?

Analysis

O.C.G.A. § 48-8-3(57) exempts “food and food ingredients” from state (but not local) tax when such items are sold to individual consumers for off-premises human consumption.¹ “Food and food ingredients” means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.² “Food and food ingredients” does not include alcoholic beverages, dietary supplements, or tobacco. For purposes of the exemption in Code Section 48-8-3(57), “food and food ingredients” also does not include prepared food.

“Prepared food” generally means food:

1. Sold in a heated state or heated by the seller;
2. With two or more food ingredients mixed or combined by the seller for sale as a single item; or
3. Sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.³

If Taxpayer purchases the items at issue (juice chewables and nutrition bars) and resells the items, such items do not satisfy the definition of “prepared food” quoted above. In such a case, Taxpayer would simply be a reseller of prepackaged items. The prepackaged juice chewables and nutrition bars would not be sold in a heated state or heated at any time by the seller. In this scenario, Taxpayer is the seller (again, assuming Taxpayer is merely reselling the

¹ O.C.G.A. § 48-8-3(57).

² O.C.G.A. § 48-8-2(16).

³ O.C.G.A. § 48-8-2(27)(A).

items) but did not create the items by mixing or combining ingredients, and the items would not be sold with eating utensils.

Despite the general definition of “prepared food” above, “prepared food” does not include food sold by a seller whose proper primary North American Industrial Classification System code is subsector 311, food manufacturing, except for industry group 3118, bakeries and tortilla manufacturing, if sold without eating utensils provided by the seller.)⁴ Thus, if Taxpayer is the manufacturer of the juice chewables and nutrition bars, such items would be excluded from the definition of “prepared food” when sold by Taxpayer because such items would be “food sold by a seller whose proper primary North American Industrial Classification System code is subsector 311 . . . without eating utensils . . .”

“Dietary supplement” means any product, other than tobacco, intended to supplement the diet that:

1. Contains one or more of the following dietary ingredients: a vitamin, mineral, herb or other botanical, amino acid, a dietary substance for use by humans to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite, constituent, extract, or combination of any ingredient described above; and
2. 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
3. Is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label as required pursuant to 21 C.F.R. § 101.36.⁵

“Conventional foods are foods that are not dietary supplements. . . 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 "Supplement Facts" panel.”⁶

Ruling

Taxpayer’s juice chewables and nutrition bar products are exempt from state sales tax, but not local sales tax, when sold to individual consumers for off-premises human consumption, because each falls within the scope of the “food and food ingredients” state sales tax exemption. These products are neither “prepared food” nor “dietary supplements”. The Department of Revenue assumes, but does not opine on whether, these products are properly labeled with a Nutrition Facts Box and are not required to be labeled as dietary supplements, identifiable by the “Supplement Facts” box as required by the Code of Federal Regulations.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions and taxpayer in question. Should the circumstances regarding the transactions change, or differ materially from those represented, then this ruling may become invalid. In addition, please be advised that subsequent statutory or administrative rule changes or judicial interpretations of the Statutes or Rules upon which this advice is based may subject similar future transactions to a different tax treatment than that expressed in this response.

⁴ O.C.G.A. § 48-8-2(27)(B).

⁵ O.C.G.A. § 48-8-2(11.1).

⁶ <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194357.htm>