

Date Issued: June 6, 2016  
Georgia Letter Ruling: LR SUT-2016-13  
Topic: Multi-level Marketing - Food

This letter is in response to your request for guidance on the proper application of Georgia sales and use tax to sales of certain products offered by [Redacted] (“Taxpayer”).

### **Facts as Provided by Taxpayer**

Taxpayer is located out of state and has no physical location in Georgia. Taxpayer is a multi-level marketing company that sells its products exclusively to and through a network of independent distributors. Taxpayer’s products include [various redacted products]. Taxpayer manufactures some products and acquires other products from a contract manufacturer.<sup>1</sup> Taxpayer’s sales are for resale,<sup>2</sup> and Taxpayer collects sales tax on distributor orders at the suggested retail price on taxable products and remits the tax on behalf of its distributors. Taxpayer does accept completed exemption certificates when provided by its distributors.<sup>3</sup>

Taxpayer’s products have two types of product labels: Nutrition Facts or Dietary Supplement Facts. The products for which a determination of taxability is requested all have Nutrition Fact labels as determined and regulated by the U.S. Food and Drug Administration. Taxpayer has provided copies of package labels for the [Redacted] products (collectively referred to as “Products” or “the Products”):

### **Issue**

How is sales and use tax appropriately applied to Taxpayer’s sales of the Products?

### **Analysis**

Georgia levies and imposes a tax (subject to certain exemptions) on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on certain enumerated services.<sup>4</sup> “Retail sale” includes “[s]ales of tangible personal property to persons for resale when there is likelihood that the state will lose tax funds due to the difficulty of policing the business operations because:

- (i) Of the operation of the business;
- (ii) Of the very nature of the business;
- (iii) Of the turnover of so-called independent contractors;
- (iv) Of the lack of a place of business in which to display a certificate of registration;
- (v) Of the lack of a place of business in which to keep records;
- (vi) Of the lack of adequate records;
- (vii) The persons are minors or transients;
- (viii) The persons are engaged in essentially service businesses; or
- (ix) Of any other reasonable reason.

Because Taxpayer is an out-of-state multi-level marketing company that sells the Products for resale exclusively through a network of distributors, there is a likelihood that the state will lose tax funds on the ultimate sale of Taxpayer’s Products by the distributors. Thus, based on the facts at hand, Taxpayer’s sales to its distributors are retail sales and are subject to sales and use tax.

O.C.G.A. § 48-8-3(57) exempts “food and food ingredients” from state (but not local) sales and use tax when such items are sold to individual consumers for off-premises human consumption.<sup>5</sup> “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.<sup>6</sup>

---

<sup>1</sup> May 4, 2016 e-mail.

<sup>2</sup> May 5, 2016 e-mail.

<sup>3</sup> Id.

<sup>4</sup> O.C.G.A. §§ 48-8-1, 48-8-30(a).

<sup>5</sup> O.C.G.A. § 48-8-3(57).

<sup>6</sup> O.C.G.A. § 48-8-2(16).

However, the term “food and food ingredients” does not include alcoholic beverages, dietary supplements, or tobacco.<sup>7</sup> “Dietary supplement” means any product, other than tobacco, intended to supplement the diet that, in addition to other criteria, is required to be labeled as a dietary supplement, identifiable by the “Supplement Facts” box found on the label as required pursuant to 21 C.F.R. § 101.36.<sup>8</sup> By federal regulation, conventional foods must have a “Nutrition Facts” panel on their labels, but dietary supplements must have a “Supplement Facts” panel.<sup>9</sup>

For purposes of the exemption in Code Section 48-8-3(57), “food and food ingredients” also does not include prepared food. Prepared food is, thus, subject to both state and local sales and use tax.

“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.

In the present case, Taxpayer’s Products are substances sold for human consumption through independent distributors. The Product labels describing the taste and nutritional value of the Products reaffirm that they are intended to be consumed for these reasons. Moreover, pursuant to the Code of Federal Regulations, the Products are labeled with a “Nutrition Facts” panel rather than a “Supplement Facts” panel and in all likelihood are not sold by the distributors in such a manner that the Products would be taxable as “prepared food” but are sold to individuals for off-premises consumption. As such, the Products are considered “food and food ingredients” for purposes of the exemption in O.C.G.A. §48-8-3(57) and are consequently exempt from state (but not local) sales tax.

In cases where distributors present a resale certificate to Taxpayer, Taxpayer is not obligated to collect the tax as long as:

the certificate is fully completed with the distributor’s name, address, telephone number, valid sales tax number, and signature,

the distributor is engaged in the business of selling the type of items being purchased, and

at the time of purchasing the tangible personal property, the seller has no reason to believe that the purchaser does not intend to resell it in his or her regular course of business.<sup>10</sup>

### **Ruling**

Based on the facts presented, Taxpayer’s sales of the Products that are properly labeled with a “Nutrition Facts” box are exempt from state sales tax, but not local sales tax, because the Products fall within the scope of the “food and food ingredients” state sales tax exemption. Taxpayer is appropriately collecting sales tax on its distributor orders at the suggested retail prices unless Taxpayer accepts in good faith a fully completed resale certificate from a distributor.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances, and taxpayer in question. Should the circumstances regarding the transactions change or differ materially from those represented, this ruling may become invalid. Subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this ruling is based may subject similar future transactions to different tax treatment than that expressed in this ruling.

---

<sup>7</sup> *Id.*

<sup>8</sup> O.C.G.A. § 48-8-2(11.1); Ga. Comp. R. & Regs. r. 560-12-2-.104. Dietary supplements must also (a) contain 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 (b) be 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.

<sup>9</sup> U.S. Food and Drug Administration, *FDA Basics: What is the difference between a dietary supplement and a conventional food?* <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194357.htm>.

<sup>10</sup> O.C.G.A. § 48-8-38.