

Georgia Letter Ruling: LR SUT-2019-08
Topic: Retail Sale; Dietary Supplements
Date Issued: October 18, 2019

This letter is in response to your three requests for guidance on the application of Georgia sales and use tax to sales of certain products and fees charged by Taxpayer.

Facts Presented by Taxpayer

Taxpayer sells nutritional, dietary, and skin care products through a multi-level network of independent distributors. Taxpayer is considered an “MLM” or multi-level marketer. Generally, Taxpayer charges sales tax based upon the address to which the company ships products and based upon the suggested retail price.¹

Products

Taxpayer is rolling out five new products containing hemp extracts. Hemp extract is growing in popularity and use as a dietary supplement. Hemp extract is being sourced from industrial hemp, as defined by the Agricultural Improvement Act of December 2018, containing less than 0.3% THC. Two of the products are balms containing differing concentrations of hemp extract. The balms are intended for topical application. Three of the products are food-grade oils. One oil is made with full spectrum hemp extract, and two oils are made with hemp extract isolate products. The oils are administered via a tincture dropper under the tongue. The oils have “Supplement Facts” labels.

Additionally, Taxpayer recently reformulated a dietary supplement. The product is now sold as a powder rather than in liquid form. The new version is not ready for immediate consumption: the user must first mix the powder with water or some other liquid. The product has a “Supplement Facts” label.

Enrollment and renewal fees

Distributors pay a fee when they sign up to be a distributor, and they are required to renew their status annually, at the same rate. The annual renewal fee is paid by each distributor in order to remain in “active” status. All “active” distributors maintain a wholesale discount on products purchased. Distributors earn a percentage discount on the products purchased based on the volume of products purchased. Distributors are not required to purchase a minimum amount of Taxpayer’s products, and the distributor fee is not applied toward future purchases. Active distributors also receive distributor support services and web access. There is no tangible item provided in exchange for the enrollment and renewal fees.²

Issues

1. Are charges for the products described above subject to sales and use tax in Georgia?
2. Are charges for enrollment and renewal of distributor status subject to sales and use tax in Georgia?

Analysis

Georgia levies and imposes a tax (subject to certain specific exemptions) on the retail purchase, retail sale, storage, use, or consumption of tangible personal property and on certain services.³ “Retail sale” means a sale of tangible personal property or taxable services to any person other than for resale.⁴

Products

¹ Certain orders that have been certified for personal usage by distributors are taxed based upon wholesale pricing.

² Previously, Taxpayer would mail a welcome kit and a periodic magazine to distributors.

³ O.C.G.A. §§ 48-8-1 and 48-8-30(a).

⁴ O.C.G.A. § 48-8-2(31).

Sales and use tax is broadly imposed on all retail sales of tangible personal property.⁵ Exemptions from taxation are strictly construed, and an exemption will not be granted unless the relevant provision clearly and distinctly shows that such was the plain and unambiguous intention of the General Assembly.⁶

Georgia law defines “dietary supplement” as 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 “Supplements Facts” box found on the label as required pursuant to 21 C.F.R. Section 101.36.⁷ Georgia law does not provide a sales and use tax exemption for the sale or use of dietary supplements.⁸

Taxpayer sells three oils and a powder that, presuming proper labelling, fall within the definition of dietary supplements. However, no sales and use tax exemption is extended to such products based on this categorization. Taxpayer’s sales of topical hemp balms, hemp oils, and 24K powder are sales of tangible personal property. Based on the facts provided, such sales are not exempt from sales and use tax.

Enrollment and renewal fees

Taxpayer’s distributors pay a fee for the right to purchase, promote, and sell Taxpayer’s products and for the possibility of receiving additional discount benefits. Distributors do not receive tangible personal property in exchange for paying a distributor fee, and the distributor fee is not applied toward future purchases. Moreover, distributors are not required to purchase products. Since the payment of the enrollment and renewal fee does not include the sale of tangible personal property or any service enumerated by law, such fees are not subject to sales and use tax.⁹

Rulings

1. Taxpayer’s sales of products that are properly labeled with a “Supplement Facts” box and Taxpayer’s sales of topical balms are sales of tangible personal property. The sales of such products do not fall within an exemption and, thus, are subject to state and local sales and use tax.

2. A charge for the right to sell products is not the sale of tangible personal property or services as contemplated in Georgia statutes or regulations; therefore, Taxpayer’s charges to enroll as a distributor and to renew distributor status are not subject to sales and use tax in Georgia.

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. The facts herein are those presented by the taxpayer and the Department accepts them as true for this ruling. If the facts presented herein change, are not true, are different, or material facts have been omitted, the conclusions reached in this ruling may change. In addition, 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 ruling.

⁵ O.C.G.A. §§ 48-8-1 and 48-8-30(a).

⁶ Ga. Comp. R. & Regs. r. 560-12-1-.18.

⁷ O.C.G.A. § 48-8-2(11.1). Dietary supplements must also (a) contain one or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an 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.

⁸ See LR SUT-2014-18. The defined term “food and food ingredients” explicitly excludes dietary supplements, so any exemption for certain sales of food and food ingredients would not apply to dietary supplements. O.C.G.A. §§ 48-8-2(16) and 48-8-3(57).

⁹ See LR SUT 2016-14.