

This letter concerns the low 1% State rate of tax applicable to food, drugs and medical appliances. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

August 26, 2009

Dear Xxxxx:

This letter is in response to your email dated July 10, 2009, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

ABC sells nutritional, dietary, and skin care products through a multi-level network of independent distributors. ABC is considered an 'MLM' or multi-level marketer such as Amway. Our physical location is in CITY/STATE. ABC charges sales tax based upon the address to which we ship and based upon suggested retail price. ABC files one consolidated state sales/excise tax return in lieu of each independent distributor filing a separate return with your state.

We are launching a new product line in mid August 2009. The [product] line will include a fortified soy milk product, an all-natural sweetener, and an SPF30+ sunscreen. I am requesting formal ruling on the taxability of these new products. I have included copies of the product labels to assist in the rulings.

Please send the letter rulings or binding opinions to my attention at the address provided. If you need additional information, please contact me.

Thank you for your assistance in this matter.

DEPARTMENT'S RESPONSE:

All gross receipts from sales of tangible personal property in Illinois are subject to Retailers' Occupation Tax and Use Tax unless an exemption is specifically provided. Qualifying food, drugs,

medicines and medical appliances are not taxed at the general merchandise rate of 6.25%. These items are taxed at a lower state rate of 1% plus any applicable local taxes. See 86 Ill. Adm. Code 130.310.

Food that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, and food that has been prepared for immediate consumption) is taxed at the rate of 1% plus applicable local taxes. Food is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, unsweetened bottled water and ice. Beginning September 1, 2009, all candy is taxable at the State 6.25% general merchandise rate. Candy is defined as a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. Candy does not include any preparation that contains flour or requires refrigeration.

Through August 31, 2009, the term "soft drinks" means any complete, finished, ready-to-use, non-alcoholic drink, whether carbonated or not, including but not limited to soda water, cola, fruit juice, vegetable juice, carbonated water, and all other preparations commonly known as soft drinks of whatever kind or description that are contained in any closed or sealed bottle, can, carton, or container regardless of size. "Soft drinks" does not include coffee, tea, non-carbonated water, infant formula, milk or milk products defined in the Grade A Pasteurized Milk and Mild Products Act, or drinks containing 50% or more natural fruit or vegetable juice. Beginning September 1, 2009, the definition of "soft drinks" means non-alcoholic beverages that contain natural or artificial sweeteners, but does not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than 50 % vegetables or fruit juice by volume.

Under the Retailers' Occupation Tax Act, a medicine or drug is any pill, powder, potion, salve, or other preparation intended by the manufacturer for human use and which purports on the label to have medicinal qualities. A written claim on the label that a product is intended to cure or treat disease, illness, injury or pain, or to mitigate the symptoms of such disease, illness, injury or pain constitutes a medicinal claim. See 86 Ill. Adm. Code 130.310(c). The rule was amended in 2002 to provide examples of claims that do constitute medical claims and those that do not. The following information may assist you in making the determination whether the items you have referenced qualify as a drug or medicine under Section 130.310(c).

Examples of medicinal claims that will qualify the product for the low rate of tax include, but are not limited to:

- i) medicated
- ii) heals (a medical condition)
- iii) cures (a medical condition)
- iv) for relief (of a medical condition)
- v) fights infection
- vi) stops pain
- vii) relief from poison ivy or poison oak
- viii) relieves itching, cracking, burning
- ix) a soaking aid for sprains and bruises
- x) relieves muscular aches and pains
- xi) cures athlete's foot
- xii) relieves skin irritation, chafing, heat rash and diaper rash
- xiii) relief from the pain of sunburn
- xiv) soothes pain.

Please note the use of the terms “antiseptic,” “antibacterial” or “kills germs” may or may not constitute a medicinal claim. The use of these terms in conjunction with a claim that the product kills germs in general does not constitute a medicinal claim. However, a claim that a product is for use as an antiseptic to kill germs to prevent infection in cuts, scrapes, abrasions and burns does constitute a medicinal claim.

Examples of claims that do not constitute medicinal claims include, but are not limited to:

- i) cools
- ii) absorbs wetness that can breed fungus
- iii) deodorant, or destroys odors
- iv) moisturizes
- v) freshens breath
- vi) antiperspirant
- vii) sunscreen
- viii) prevents
- ix) protects.

Beginning on September 1, 2009, the term "nonprescription medicines and drugs" does not include grooming and hygiene products. Grooming and hygiene products include, but are not limited to, soaps and cleaning solutions, shampoo, toothpaste, mouthwash, antiperspirants, and sun tan lotions and screens, unless those products are available by prescription only. If an item is a non-prescription grooming and hygiene product, it will be taxed at the State 6.25% general merchandise rate regardless of any medicinal claims made on the product's label.

You note in your letter that ABC files one consolidated state sales/excise tax return in lieu of each independent distributor filing a separate return with the State of Illinois. Information concerning the "Filing of Returns for Retailers by Suppliers Under Certain Circumstances" may be found at 86 Ill. Adm. Code 130.550. This regulation explains that manufacturers, importers or wholesalers can enter into an "agency agreement" with the Department, whereby they register, file returns and remit Retailers' Occupation Tax on behalf of their local distributors. Please note that such arrangement must be accepted by the Department and is subject to any written objections of the retailers that would be affected.

The Agency Agreement (RR-80) may be used to obtain approval of such an arrangement with the Department. Under this type of agreement, the manufacturers, importers or wholesalers sell products to local distributors and collect tax from the distributors based upon the selling price to the ultimate consumers. The applicable tax is not based upon the sale to the local distributors. The appropriate tax must be collected for the sale to the distributors' ultimate customers, which includes State and any applicable local tax. In general, the determination of any local tax liability will depend on the location where the purchase order is accepted from the ultimate customer. See 86 Ill. Adm. Code 270.115.

When manufacturers, importers or wholesalers operate under this type of agency agreement, the local distributors need not register, file returns or remit taxes since the manufacturers, importers or wholesalers have agreed to this responsibility. The local distributors should, however, retain a copy of the agreement. If they fail to provide such documentation upon demand by the Department, they will be required to register, file returns, and remit the appropriate amount of tax directly to the Department. Distributors who prefer to register and remit their own taxes may opt out of the agency agreement.

Taxpayers may acquire form RR-80 (Agency Agreement) by contacting the Department's Central Registration Unit, attention Manager, located at Illinois Department of Revenue, 101 West Jefferson, Springfield, Illinois 62702.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Associate Counsel

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