

ST 25-0003-GIL 12/13/2024 FOOD

This letter discusses the State tax rate applicable to sales of food. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

December 13, 2024

NAME
COMPANY
EMAIL

Dear NAME:

This letter is in response to your email dated November 20, 2024, in which you requested 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 <https://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:

I’m a tax research professional looking for a private letter ruling on behalf of a client.

We would like to get guidance on the taxability of tobacco alternative products that do not contain tobacco or nicotine such as PRODUCT and PRODUCT1. Some of these products have a nutrition facts panel and use food ingredients (coffee, herbs, tea) but are intended to be snuff alternatives. Some of these products contain some sort of energy supplement like caffeine. My client is a convenience store.

Thank you in advance for your help!

DEPARTMENT’S RESPONSE:

Tobacco Products

A tax is imposed on any person engaged in business as a distributor of tobacco products at the rate of 36% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in this State; except that, beginning on January 1, 2013, the tax on moist snuff shall be imposed at a rate of \$0.30 per ounce, and a proportionate tax at the like rate on all fractional parts of an ounce, sold or otherwise disposed of to retailers or consumers located in this State. 35 ILCS 143/10-10. The impact of the tax levied by this Act is imposed upon distributors engaged in the business of selling tobacco products to retailers or consumers in this State.

“Tobacco products” means any cigars, including little cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff (including moist snuff) or snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; ...

“Distributor” means any of the following:

- (1) Any manufacturer or wholesaler in this State engaged in the business of selling tobacco products who sells, exchanges, or distributes tobacco products to retailers or consumers in this State.
- (2) Any manufacturer or wholesaler engaged in the business of selling tobacco products from without this State who sells, exchanges, distributes, ships, or transports tobacco products to retailers or consumers located in this State, so long as that manufacturer or wholesaler has or maintains within this State, directly or by subsidiary, an office, sales house, or other place of business, or any agent or other representative operating within this State under the authority of the person or subsidiary, irrespective of whether the place of business or agent or other representative is located here permanently or temporarily.
- (3) Any retailer who receives tobacco products on which the tax has not been paid.

The tax is imposed on the distributors of tobacco products, not the retailer or consumer. At the time the distributor sells the tobacco product to a retailer or consumer, the distributor must determine whether the product meets the definition of “tobacco product”.

The definition of “tobacco products” identifies common types of products that are generally considered to be included within the definition: cigars; various forms or types of tobacco that are smoked, although the list is not all-inclusive; snuff; various forms of chewing tobacco, although the list is not all-inclusive; miscellaneous forms of tobacco, such as refuse or scraps; “and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise”.

The definition must be construed broadly. Although it identifies specific types of tobacco that are generally smoked or chewed, the definition explicitly includes “shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco”. The definition concludes by including “other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise.” After reviewing the definition, the inescapable conclusion is, if one can possibly smoke or chew the tobacco, the product is a “tobacco product” and is subject to tax. This is the analysis the distributor must make because the distributor is not in the position of knowing what the ultimate use of the product will be.

Retailers’ Occupation Tax

The Illinois Retailers’ Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property at retail to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as “sales” tax in Illinois.

Food sold at retail in Illinois is subject to Retailers’ Occupation Tax and Use Tax. Items that qualify as food, drugs and medical appliances are taxed at the low State rate of 1%. The Department’s regulation regarding the appropriate tax rates for food can be found at 86 Ill. Adm. Code 130.310.

Food that is to be consumed off the premises where it is sold (other than alcoholic beverages, candy, 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, bottled water, and ice. 86 Ill. Adm. Code. 130.310(c)(1).

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“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. Thus, if a product contains flour or requires refrigeration, it would not be considered “candy” even if it meets all the other elements of the definition.

To determine whether an item meets the definition of “candy”, it must be analyzed using the factors listed below:

- B) Flour: Products whose ingredient list contain the word “flour”, regardless of the type of flour (e.g., wheat, rice) are not candy. . . .
- C) Refrigeration: Items that require refrigeration are not considered to be candy. . . .
- D) Sweeteners: Candy is limited to products that contain sugar, honey, or other natural or artificial sweeteners. . . .
- E) Bars, drops or pieces: Items must be in the form of bars, drops or pieces to be considered candy.

86 Ill. Adm. Code 130.310(d)(7)(B) through (E).

The regulation goes on to provide examples of items that are not considered candy because they do not meet the requirements of subsections (d)(7)(B) through (E).

I hope this information is helpful. If you require additional information, please visit our website at <https://tax.illinois.gov/> or contact the Department’s Taxpayer Information Division at 800-732-8866.

Very truly yours,

Kimberly Rossini
Associate Counsel

KAR:slc