

FINAL PRIVATE LETTER RULING

REQUEST LETTER

08-009

August 5, 2008

NAME
ADDRESS
PHONE
FAX

Re: Tax Rates for our Products

Our Company has been correspondence with the Tax Master via e-mails concerning our products. We sell our products as a “Dietary Supplement”, “Antioxidants and Phytonutrient” some are sold for the enzymes. The Tax Master was unable to answer our questions as to weather our products are class as food under your laws and to be charged a lower Use tax rate.

We are requested a written decision concerning our products and were informed to contact your agency and ask for a “Private Letter Ruling”.

I have enclosed copies of some of our product labels for your review to better help with your decision.

Thank you

NAME

RESPONSE LETTER

October 9, 2008

NAME
ADDRESS

RE: Private Letter Ruling Request 08-009—Sales and Use Tax Treatment of Six Dietary Supplements and Health Food Products

Dear NAME:

You have requested a ruling to determine whether Simplexity's six products are "food" under Utah sales and use tax law so that they would be subject to the lower tax rate. Simplexity's six products are described as follows:

1. 120 Vegetarian Capsules of Alpha Sun Dietary Supplement
2. 180 Vegetarian Capsules of SBG Zymes plus Dietary Supplement
3. 100 Vegetarian Capsules of Acidophilus Dietary Supplement
4. 340 g Container (2.5 g per serving; 136 servings) of APA Blend Dietary Supplement
5. Single Serving "bg BAR," an Energy Bar
6. 300g Container of Powder to Make 15 Servings of Super Sun Smoothies

These products have labels with either Supplement Facts boxes or Nutrition Facts boxes; no products have labels with Drug Facts boxes. While not specifically stated or established, we assume for purposes of this ruling that these products are sold by Simplexity for human use only. Based on our analysis below, Simplexity's six products would be "food" under Utah sales and use tax law and subject to the lower tax rate.

Applicable Law

Utah Code Ann. § 59-12-103(1), taxing tangible personal property, states:

(1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: (a) retail sales of tangible personal property made within the state . . .

Utah Code Ann. § 59-12-102(34) defines food and food ingredients as follows:

(a) "Food and food ingredients" [as] substances: (i) regardless of whether the substances are in: (A) liquid form; (B) concentrated form; (C) solid form; (D) frozen form; (E) dried form; or (F) dehydrated form; and (ii) that are: (A) sold for: (I) ingestion by humans; or (II) chewing by

humans; and (B) consumed for the substance's: (I) taste; or (II) nutritional value. (b) "Food and food ingredients" includes an item described in Subsection (66)(b)(iii). (c) "Food and food ingredients" does not include: (i) an alcoholic beverage; (ii) tobacco; or (iii) prepared food.

Utah Code Ann. § 59-12-103(2)(c) provides the tax rate for food and food ingredients, stating:

(c) Except as provided in Subsection (2)(d) or (e), a state tax and a local tax is imposed on amounts paid or charged for food and food ingredients equal to the sum of: (i) a state tax imposed on the amounts paid or charged for food and food ingredients at a tax rate of 1.75%; and (ii) a local tax equal to the sum of the tax rates a county, city, or town imposes on the amounts paid or charged for food and food ingredients under this chapter other than this part.

Utah Code Ann. § 59-12-102(26) defines dietary supplements as follows:

"Dietary supplement" [as] a product, other than tobacco, that: (a) is intended to supplement the diet; (b) contains one or more of the following dietary ingredients: (i) a vitamin; (ii) a mineral; (iii) an herb or other botanical; (iv) an amino acid; (v) a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or (vi) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in Subsections (26)(b)(i) through (v); (c) (i) except as provided in Subsection (26)(c)(ii), is intended for ingestion in: (A) tablet form; (B) capsule form; (C) powder form; (D) softgel form; (E) gelcap form; or (F) liquid form; or (ii) notwithstanding Subsection (26)(c)(i), if the product is not intended for ingestion in a form described in Subsections (26)(c)(i)(A) through (F), is not represented: (A) as conventional food; and (B) for use as a sole item of: (I) a meal; or (II) the diet; and (d) is required to be labeled as a dietary supplement: (i) identifiable by the "Supplemental Facts" box found on the label; and (ii) as required by 21 C.F.R. Sec. 101.36.

Analysis

Dietary supplements are tangible personal property subject to Utah sales and use tax under § 59-12-103(1)(a). Utah does not have a specific exemption relating to Simplicity's products. "Food and food ingredients" are defined in § 59-12-102(34)(a) and are taxed at the lower rate that is defined in § 59-12-103(2)(c). As of January 1, 2008, this rate is a combined state and local rate of 3 percent.

Although dietary supplements are separately defined in § 59-12-102(26), they still also meet the definition of food and food ingredients. Under § 59-12-102(34), food and food ingredients are sold for human ingestion for the substance's taste or nutritional

value. Dietary supplements meet this definition; people consume them for the substance's nutritional value. Notably, the definition of food and food ingredients does not exclude dietary supplements. Under § 59-12-102(34)(c), alcoholic beverages, tobacco, and prepared food are specifically excluded, but dietary supplements are not. Dietary supplements are a subset of food and food ingredients.

Additionally, the Utah State Tax Commission has a web page titled, "Food Tax Rate Reduction," available at http://tax.utah.gov/sales/food_rate.html¹ on the Internet. This web page contains a "Product List: Food versus Non-Food Matrix," wherein nutritional supplements and vitamins are classified as grocery food and taxed at the lower rate.² The web page also contains a section titled "Vitamins and Food Supplements," which clearly states that "[v]itamins and food supplements are grocery food taxed at the lower statewide rate." Likewise, the web page contains a flow chart titled "Sales Tax: Full Rate versus Reduced Rate," under which dietary supplements would be taxed at the reduced rate. Under this flow chart, items are taxed at the lower rate if the item is ingested or chewed by a person for its taste or nutritional value, the item is not an alcohol beverage or tobacco, the item is not sold in a heated state, the item is not a combination of two or more food ingredients, and the item is not provided with an eating utensil. Generally, over-the-counter dietary supplements regularly meet all of these requirements, and they qualify for the reduced rate.

Dietary supplements are still food and food ingredients even if they have Supplement Facts boxes instead of Nutrition Facts boxes. The "Product List: Food versus Non-Food Matrix," discussed previously, states that having Nutrition Facts boxes rather than Drug Facts boxes distinguish products taxed at the lower rate as food items from those taxed at the full rate as non-food items. However, vitamins and other supplements regularly have Supplement Facts boxes, not Nutrition Facts boxes or Drug Facts boxes. Although Supplement Fact boxes are not addressed, the Utah State Tax Commission treats Supplement Facts boxes the same as Nutrition Facts boxes for the purpose of determining whether an item qualifies as food and food ingredients for the lower tax rate.

Dietary supplements potentially could be excluded from food and food ingredients if they fall within the categories of (1) alcoholic beverages, (2) tobacco, (3)

¹ The Utah State Tax Commission frequently refers taxpayers to this web page, which was last revised on June 13, 2008.

² In the web page, the Utah State Tax Commission refers to food and food ingredients as "grocery food" (*see* the Background and Definitions sections) or as "food" (*see* the Product List: Food versus Non-Food Matrix).

prepared food, or (4) drugs.³ However, over-the-counter dietary supplements typically do not fall in these categories.

In the present situation, Simplexity's six products are food and food ingredients under Utah sales and use law and, thus, are taxed at the lower rate. Although Simplexity's products may also be dietary supplements under Utah law, it is unnecessary to make such a determination; dietary supplements are a subset of food and food ingredients. Simplexity's products are very similar to the nutritional supplements and vitamins that are listed in the Food versus Non-Food Matrix as food and subject to the lower tax. Simplexity's products have Nutrition Facts boxes and Supplement Facts boxes and not Drug Facts boxes, which also means that the products are food and food ingredients and taxed at the lower rate. Finally, nothing in products' labels indicates that the products are alcoholic beverages, tobacco, prepared food, or drugs.

Conclusion

Based on the above analysis, all of Simplexity's six products would be taxed as "food" under Utah sales and use tax and subject to the lower rate. Our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, if you have additional facts that may be relevant, or if you have any other questions, please contact us.

For the Commission,

R. Bruce Johnson
Commissioner

RBJ/aln
08-009

³ See § 59-12-102(34)(c) (for exclusion of alcoholic beverages, tobacco, or prepared foods); § 59-12-102(29)(b) (for exclusion of drugs); § 59-12-102(6) (for definition of alcoholic beverages); § 59-12-102(107) (for definition of tobacco); § 59-12-102(66) (for definition of prepared food); and § 59-12-102(29) (for definition of drugs).