

This letter concerns the 6.25% State rate of tax applicable to soft drinks. 86 Ill. Adm. 130.310.
(This is a GIL.)

May 24, 2011

Dear Xxxxx:

This letter is in response to your letter dated May 3, 2011, 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 and its Illinois convenience stores, respectfully request a letter ruling from the Illinois Department of Revenue regarding the application of the Retailers' Occupation Tax to products known as 5 Hour Energy.

Issue:

Whether 5 Hour Energy Dietary Supplements purchased from a ABC store are subject to the General Merchandise (high) tax rate in Illinois or the Qualifying Food and Drug (low) rate of tax.

To the best of ABC's, knowledge, the State has not issued a letter ruling on this matter before.

Facts:

ABC is a convenience store grocer that has stores in various locations throughout Illinois. ABC generally accepts food stamps in its stores and does not provide on-site eating facilities. The IBT number for ABC, is #, which is not under audit currently. ABC stores carry a combination of items subject to the General Merchandise (high) tax rate in Illinois or the Qualifying Food and Drug (low) rate of tax.

In particular, ABC stores sell a product called 5 Hour Energy. Per the manufacturer, 5 Hour Energy products are labeled and classified by the Federal Food and Drug Administration (FDA) as a dietary supplement. 5 Hour Energy has a high concentration

of B12 and B6 vitamins and is 2 ounces in size. Please see the attached 5 Hour Energy product label sample which includes the ingredients label.

Discussion:

ABC believes the 5 Hour Energy products are subject to the low tax rate in Illinois. The product's classification as a dietary supplement by the FDA, combined with the high concentration of B12 and B6 vitamins along with the small 2 oz. liquid size all indicate that this product is a food supplement/ vitamin. Please reference Illinois Administrative Code §130.310(c)(1). Food, Soft Drinks and Candy. 'Food is 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.'

Additionally, a review of the 5 Hour Energy products as a 'soft drink' subject to high tax, shows that this product fails to meet the State's definition of soft drink. Pursuant to 86 ILAC 130.310(d)(6)(B), 'the term 'soft drinks' means nonalcoholic beverages that contain natural or artificial sweeteners. While 5 Hour Energy products are non-alcoholic, they do not contain natural or artificial sweeteners. The ingredients label states that the product contains 'natural and artificial flavors' but 86 ILAC130.310(d)(6)(C) [sic] notes that the definition of 'natural and artificial sweeteners do not include natural or artificial flavors.'

Conclusion:

ABC respectfully requests that the Illinois Department of Revenue find that 5 Hour Energy products purchased from a ABC store are subject to the Qualifying Food and Drug (low) rate of tax.

DEPARTMENT'S RESPONSE:

Please see the Department's Regulation entitled "Food, Soft Drinks and Candy" at 86 Ill. Adm. Code 130.310 which can be found on the Department's website. As you can see in the regulation, "soft drinks" mean non-alcoholic beverages that contain natural or artificial sweeteners; but "soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than 50% of vegetable or fruit juice by volume. This regulation contains examples of various sweeteners, one of which is "sucralose". I noticed sucralose is contained in the product about which you inquired. In addition, this regulation contains examples of products that fall within the definition of "soft drinks" and specifically lists sport or energy drinks as an example of a soft drink. 86 Ill. Adm. Code 130(e)(D)(iv).

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,

Debra M. Boggess
Associate Counsel