

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

August 23, 2013

Dear Xxxxx:

This letter is in response to your letter dated April 25, 2013, 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](http://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:

I am writing to request your opinion as to the sales tax rate applicable concerning certain food items; particularly certain diet food protein bars and drinks.

### **Statement of Facts**

We operate a weight loss program/diet food business. As such as well ‘ready-to-serve’ drinks, protein bars, snack chips as well as items to be prepared such as soup and omelet mixes. We also sell vitamins and supplements. At the direction of our supplier we are currently charging the high sales tax rate of 6.25% on all items under the argument that our items are considered ‘immediately consumable’. However, after further research, I believe these items qualify for the reduced food rate when the definition of ‘immediately consumable’ is more thoroughly explored ... we do **not** manufacture or prepare any of these items; nor do we have any type of seating available on our premises for immediate consumption. All items are sold at room temperature. All are sold as part of our weight loss program. Our clients generally purchase multiples of many items with the intent that they will consume them at a later time. I believe these items to be considered ‘grocery’ items.

Given the above information I believe that all of our food items qualify for the reduced food rate of 1%. The vitamins and supplements would be at the high rate of 6.25%. However, I ask your opinion as to whether the protein bar and ready-to-serve drinks we sell constitute candy/soft drink and are subject to the high 6.25% rate.

Attached are the nutritional facts and ingredient lists for some of the products in question. Illinois Regulation, 86 Ill. Adm. Code 130.310(d) (6)(C) states that drinks containing sucralose are considered soft drinks but subsection (d)(6)(E)(vii) states that drinks containing milk or milk products are *not* considered soft drinks. Our drinks contain both milk products and sucralose. Are these drinks considered soft drinks or food? Are they to be taxed at the high or low rate?

Illinois Regulation, 86 Ill. Adm. Code 130.310(d)(7)(F)(xv) states that if the ingredient list of an item contains any natural or artificial sweeteners as listed in (d)(7)(D) it is considered candy. However, (d)(7)(B) states that products containing the ingredient labeled flour are *not* candy. Most of our protein bars contain an artificial sweetener such as dextrose or sucralose yet also contain rice flour. Many also contain milk or milk products. Are these protein bars considered candy or food? Are they to be taxed at the high or low rate?

### **Requested Ruling**

Would not all the food items, including those questioned above be considered ‘food’ and therefore subject to the reduced 1.00% reduced tax rate.

In the absence of a clear definition as to whether the protein bars and drinks are candy or soft drinks, can they be allowed the 1.00% rate based on being a ‘grocery’ item?

### **Authorities Supporting Requested Ruling**

Illinois Regulation, 86 Ill. Adm. Code 130.310(c)(2)(B)(vi)

Illinois Regulation, 86 Ill. Adm. Code 130 Section 130.310(d)(7)(b)

### **Authorities Contrary to the Requested Ruling**

Illinois Regulation, 86 Ill. Adm. Code 130 Section 130.310(d)(6)(C)

Illinois Regulation, 86 Ill. Adm. Code 130 Section 130.310(d)(7)(F)(xv)

### **Representations**

To the best of my knowledge the Illinois Department of Revenue has not ruled on this specific type of issue; nor have we submitted this or a similar issue to the Department but withdrew it before a letter ruling was issued.

There appears in this ruling request no trade secret information to which we would request be deleted from the publicly disseminated version of the private letter ruling.

## **DEPARTMENT’S RESPONSE:**

The Department’s regulation “Public Information, Rulemaking and Organization” provides that “[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored.” 2 Ill. Adm. Code 1200.110(a)(4). The Department has decided to respond with a GIL.

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, 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 lower state tax rate of 1% plus applicable local taxes. In contrast, alcoholic beverages, candy, soft drinks and food that has been prepared for immediate consumption are taxed at the higher State sales tax rate of 6.25% plus applicable local taxes.

The regulation defines food 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.

Beginning September 1, 2009, "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. Thus, if a beverage contains a natural or artificial sweetener but also contains milk or milk products, soy, rice or similar milk substitutes, or greater than 50% of vegetable or fruit juice by volume, it would not fall within the definition of "soft drink" but, rather, it would fall within the definition of food.

Also beginning September 1, 2009, all candy became 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. 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. Because the definition of candy changed in September 1, 2009, the tax treatment of certain products went from the low 1% rate to the State 6.25% general merchandise rate.

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

Very truly yours,

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