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Governor

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Director

PRIVATE TAXPAYER RULING LR15-002

February 24, 2015

The Department issues this private taxpayer ruling in response to your letters dated August 16, 2013 (the "Request") requesting a ruling on behalf of *** (the "Company"). Specifically, you request a ruling on the application of Arizona's transaction privilege tax ("TPT") to Company's sales of products. Pursuant to Arizona Revised Statutes ("A.R.S.") § 42-2101, the Department may issue private taxpayer rulings to taxpayers and potential taxpayers on request.

ISSUE:

Whether the Company's gross proceeds of sales of food products are subject to Arizona's transaction privilege tax?

RULING:

Based on the facts and documentation provided, the Department rules as follows:

Company meets the definition of a qualified retailer as it is a retailer that sells food and does not provide any facilities for consumption on the premises. Therefore, sales made in by phone or via the internet and shipped to residential customers or at the Company's manufacturing facility in Arizona are exempt from Arizona's transaction privilege tax under A.R.S. § 42-5061(A)(15).

However, sales by Company to retailers are not exempt under A.R.S. § 42-5061(A)(15). A.R.S. § 42-5101(3) defines "food" as any food item intended for human consumption which is intended for home consumption. Items sold to retailers are not considered items intended for home consumption. Rather, such sales are exempt sales for resale. Retailers must provide Company with an Arizona Resale Certificate Form 5000A at the time of sale in order to exempt the sale from transaction privilege tax.

If the order for the tangible personal property is received from a location outside the state and the tangible personal property is shipped or delivered by the seller to a location outside the state, the sale is not subject tax under A.R.S. § 42-5061(A)(24).

FACTS ASSERTED BY COMPANY:

The following are facts excerpted from your letter dated August 16, 2013:

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Company is an Arizona corporation with its operations located in Phoenix, AZ. Company is the manufacturer and retailer of items.... These products are individually wrapped...prior to [being] packaged...and shipped to customers. Company accepts orders via the internet, telephone and in person at their Arizona manufacturing facility. Company does not offer any on-site dining facilities for on-site consumption of the food products sold to customers.

Upon the receipt of an order, the products desired will either be handed to the purchaser for off-site consumption or will be packaged in non-returnable containers and shipped to customers through a common carrier. All food products are manufactured in Arizona and all food products shipped to customers are sent from our Arizona facility.

DISCUSSION & LEGAL ANALYSIS:

Arizona imposes a transaction privilege tax on the privilege of conducting business in the State of Arizona. The authority to levy the transaction privilege tax is found in Arizona Revised Statutes (A.R.S.) § 42-5008. The tax is levied on the seller, rather than the purchaser.

A.R.S. § 42-5061 imposes the transaction privilege tax under the retail classification. The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business. All sales of tangible personal property are subject to the transaction privilege tax under the retail classification unless specifically exempted or excluded by statute.

A.R.S. § 42-5061(W)(3) defines "selling at retail" as "a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property". In addition, A.R.S. § 42-5001(20) defines a wholesaler as "any person who sells tangible personal property for resale and not for consumption by the purchaser." Arizona Administrative Code (A.A.C.) R15-5-101 provides that sales of tangible personal property to be resold by the purchaser in the ordinary course of business are not taxable under the retail classification.

A.R.S. § 42-5061(A)(15) exempts sales of food by a qualifying retailer. In order to be exempt, items must meet the definition of "food" and must be sold by a "qualifying retailer." Otherwise, sales of such items are subject to transaction privilege tax under the retail classification just as other sales of tangible personal property are subject to tax.

A.R.S. § 42-5101(3) defines "food" as any food item intended for human consumption which is intended for home consumption as defined by rules adopted by the Department. In addition, food items must meet the definition of "tax exempt food" provided in A.A.C. R15-5-1860(15)(a). Tax exempt food is defined in A.A.C. R15-5-1860(15)(a) as "those

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items of food intended for home consumption which, if purchased from an eligible grocery business, would be eligible . . . to be purchased with food coupons issued by the United States Department of Agriculture” (emphasis added).

A.A.C. R15-5-1860(15) also states the following:

b. Tax-exempt food shall also include any new items of food intended for human consumption which would have been eligible for purchase with food coupons issued by the United States Department of Agriculture if such items would have existed for sale on January 1, 1979.

c. The following are examples of items which the Department will consider as tax exempt food:

bread and flour products

vegetables and vegetable products

candy and confectionery

sugar, sugar products and substitutes

cereal and cereal products

butter, oleomargarine, shortening and cooking oils

cocoa and cocoa products

coffee and coffee substitutes

milk and milk products

eggs and egg products

tea

meat and meat products

spices, condiments, extracts and food colorings

fish and fish products

frozen foods

soft drinks and soda (including bottles on which a deposit is required to be paid)

fruit and fruit products

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packaged ice cream products

dietary substitutes

ice cubes and bottled water including carbonated and mineral water

purchases of seed and plants for use in gardens to produce food items for personal consumption

The rules, however, impose a presumption that food delivered by a retailer to an office or other business establishment is not considered to be food intended for home consumption. A.A.C. R15-5-1860(9). ... meet the definition of tax-exempt food if sold at the Company's Arizona facility or if delivered to a residence. These products are not exempt if delivered to a business location.

As stated in A.R.S. 42-5101(4) food for consumption on the premises includes:

(a) Hot prepared food.

(b) Hot or cold sandwiches.

(c) Food served by an attendant to be eaten at tables, chairs, benches, booths, stools, counters and similar conveniences and within parking areas for the convenience of in-car consumption of food.

(d) Food served with trays, glasses, dishes or other tableware.

(e) Beverages sold in cups, glasses, or open containers.

(f) Food sold by caterers.

(g) Food sold within the premises of theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, fairs, races, contests, games, athletic events, rodeos, billiard and pool parlors, bowling alleys, public dances, dance halls, boxing, wrestling and other matches and any business that charges admission, entrance or cover fees for exhibition, amusement or entertainment.

Based on the information provided, Company does not sell food for consumption on the premises. If Company did make such sales, the sale would be subject to transaction privilege tax.

A.A.C. R15-5-1860 defines the six types of "qualified retailers" who are entitled to sell food items tax exempt:

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1. Grocery businesses.
2. Retailers whose primary business is not the sale of food, but who sell food in a manner similar to grocery stores.
3. Retailers who sell food and who do not provide any facilities for consumption of food on the premises.
4. Delicatessen businesses.
5. A retailer who is a street or sidewalk vendor who uses a pushcart, mobile facility, motor vehicle, or other such conveyance.
6. Vending machines.

As stated in A.R.S. § 42-5101(2), "facilities for the consumption of food" means tables, chairs, benches, booths, stools, counters and similar conveniences, trays, glasses, dishes or other tableware and parking areas for the convenience of in-car consumption of food in or on the premises on which the retailer conducts his business. Company does not offer any on-site dining facilities. Therefore, Company is considered a "qualified retailer" under A.A.C. R15-5-1860(3).

A.R.S § 42-5061(A)(24) allows for a deduction for sales made in interstate or foreign commerce. A.A.C. R15-5-170 addresses the application of this deduction:

- A. Gross receipts from sales of tangible personal property made in interstate or foreign commerce are deductible from the tax base if all of the following apply:
 1. The order is received from a location outside of Arizona; and
 2. The retailer ships or delivers the tangible personal property to a location outside of Arizona for use outside of Arizona.
- B. In meeting the above requirements, if delivery is made by the retailer to a common carrier for transportation to a location outside Arizona, the common carrier is deemed to be the agent of the retailer for purposes of this rule regardless of who is responsible for payment of the freight charges.
- C. Suitable records shall be kept to substantiate the deduction for a sale made in interstate commerce. As such, records shall identify the tangible personal property sold and the delivery destination. The following records may be sufficient to substantiate the exemption:

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1. Suitable records for substantiating the receipt of an order from out-of-state may include purchase orders, letters, or written memoranda on the receipt of orders placed by telephone.
2. Suitable records for substantiating out-of-state shipments include:
 - a. Internal delivery orders supported by receipts of expenses incurred in delivering the property and signed on the delivery date by the person who delivers the property;
 - b. Common carrier's receipt or bill of lading;
 - c. Parcel post receipt;
 - d. Export declaration;
 - e. Receipt from a licensed broker; or
 - f. Proof of export or import signed by a customs officer.

This response is a private taxpayer ruling and the determinations herein are based solely on the facts provided in the Request. Therefore, the conclusions in this private taxpayer ruling do not extend beyond the facts presented in your correspondence dated August 16, 2013. The determinations are subject to change should the facts prove to be different on audit. If it is determined that undisclosed facts were substantial or material to the department's making of an accurate determination, this private taxpayer ruling shall be null and void. Further, the determination is subject to future change depending on changes in statutes, administrative rules, case law or notification of a different department position.

The determinations in this private taxpayer ruling are only applicable to the taxpayer requesting the ruling and may not be relied upon, cited nor introduced into evidence in any proceeding by a taxpayer other than the taxpayer who has received the private taxpayer ruling. In addition, this private taxpayer ruling only applies to transactions that occur or tax liabilities that accrue from and after the date the taxpayer receives the ruling.