
Opinion of the Tax Commissioner

Date Issued: May 9, 2003

Opinion No.: 02-0005

Tax: Sales/Use

XXXX
XXXX
XXXX

Subject: Vitamins, Advertising, Shipping

Dear XXXX:

This correspondence is in response to your letter dated November 15, 2002 requesting a determination of the taxability of certain items under Ohio sales and use tax statutes. This response constitutes an official opinion of the Tax Commissioner as provided in the Ohio Revised Code (R.C.) section 5703.53.

In your letter you ask about the taxability of three items. The taxability of each item is answered as follows.

1. Food supplementation products (vitamins and minerals).

Answer: The statutory definition of "food" is given at R.C. 5739.02(B)(42) reads:

As used in this section, except in division (B)(16) of this section, "food" includes cereals and cereal products, milk and milk products including ice cream, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruits, fruit products, and pure fruit juices, condiments, sugar and sugar products, coffee and coffee substitutes, tea, and cocoa and cocoa products. It **does not include:** spirituous liquors, wine, mixed beverages, or beer; soft drinks; sodas and beverages that are ordinarily dispensed at or in connection with bars and soda fountains, other than coffee, tea, and cocoa; root beer and root beer extracts; malt and malt extracts; mineral oils, cod liver oils, and halibut liver oil; medicines, including tonics, **vitamin preparations, and other products sold primarily for their medicinal properties;** and water, including mineral, bottled, and carbonated waters, and ice. (Emphasis added.)

The question of what kinds of supplements do or do not meet the criterion of this statute was treated at length in *Charles E. Sekeres and Physicians Weight Loss Center, Inc. vs. Joanne Limbach, Tax Commissioner of Ohio*, Ohio Board of Tax Appeals, Case Nos. 85-B-104 and 85-B-105 (January 7, 1987). The Board found the criterion for "food" to consist of "...articles 'sold primarily' for consumption to relieve hunger, provide bulk and fullness, and furnish nourishment for fitness, energy and growth." (Page 24 of the Board decision.) Based on the statute and this decision it is our position that items taken in pill or capsule form, or in

liquid form as a small measured dose, generally are not consumed to relieve hunger and do not provide bulk or fullness. Therefore, because such items are not considered food they are subject to the tax.

2. Sales aids.

This Department considers each of the items described on the spreadsheet attached to your letter, viz. videos, fact sheets, audios and brochures, as taxable. When sold to the independent representatives, tax should be charged on the selling price for each of these items. If sales of these items are to independent representatives who will in turn sell the promotional material to other representatives, XXXX should obtain a properly executed exemption certificate from those representatives. Those representatives selling the promotional material should report tax collected on a Delivery Vendor's License, if the sale is from Ohio, or on an out-of-state Seller's permit if the sale is made from outside Ohio. The only promotional item that could possibly be exempt from the tax would be item 225 *Energy Cycle Brochures*. If these brochures both price and describe the product to be sold to the ultimate consumer, they may claim the exemption at R.C. 5739.02(B)(36)(a):

(36)(a) Sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale.

3. Shipping.

Separately stated shipping and handling charges are not subject to the tax. This holds whether or not the sale is taxable. The charge for "handling" is also not taxable if the handling charge reasonably relates to that function.

This opinion applies only to the named taxpayer. It may not be transferred or assigned. The tax consequences stated in this opinion may be subject to change for any of the reasons state in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes.

Thomas M. Zaino
Tax Commissioner