

**TENNESSEE DEPARTMENT OF REVENUE  
LETTER RULING # 11-02**

**Letter Rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.**

**SUBJECT**

Whether certain products manufactured and distributed by [TAXPAYER] are “bottled soft drinks,” as the term is defined in Tenn. Code Ann. § 67-4-402(a)(1), and are subject to Tennessee’s bottled soft drink tax on manufactures, bottlers, distributors and sellers of bottled soft drinks.

**SCOPE**

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

## FACTS<sup>1</sup>

The [TAXPAYER] is headquartered in [LOCATION] and manufactures and distributes what it describes as dietary supplements in the form of liquids, concentrates and powder mixes under the name “[REDACTED].” Although many of the Taxpayer’s sales are made for resale, the Taxpayer also makes direct retail sales to consumers [REDACTED].

[REDACTED]. Ingredients include [TYPE OF ANTIOXIDANT] and essential vitamins. [REDACTED].

[REDACTED].

The Taxpayer’s products are available in the following forms:

- Ready-to-drink liquid in [REDACTED] cans.
- Concentrate liquid in [REDACTED] containers.
- [REDACTED].
- [REDACTED].

The Taxpayer questions whether its ready-to-drink liquid product in [REDACTED] cans and its concentrate liquid in [REDACTED] containers are “bottled soft drinks,” as the term is defined in Tenn. Code Ann. § 67-4-402(a)(1), and thus are subject to Tennessee’s bottled soft drink tax on manufactures, bottlers, distributors and sellers of bottled soft drinks. These products are described in greater detail below:

### Ready-to-Drink Liquid in [REDACTED] Cans

[TYPE OF DRINK] in ready-to-drink liquid form is available in [REDACTED] cans. [REDACTED].

Each can contains [AMOUNT] of caffeine, which [REDACTED]. [REDACTED].

By way of example, the ingredients listed on a can of [TYPE OF DRINK] are as follows:

[INGREDIENTS]

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<sup>1</sup> The Facts set forth herein were obtained from the Taxpayer’s website at [REDACTED INFORMATION] and from information contained in a letter submitted by the Taxpayer’s representative when requesting this Letter Ruling.

## Concentrate Liquid in [REDACTED]Containers

[TYPE OF DRINK] in concentrated liquid form is available in [REDACTED]. [REDACTED SIZE] containers and flavors such as [FLAVORS] are offered. The customer mixes [AMOUNT] of the concentrate with [AMOUNT] of water to obtain the product in drinkable form. Thus, [REDACTED].

By way of example, the ingredients listed on a can of [TYPE OF DRINK] are as follows:

### [INGREDIENTS]

On its web page, the Taxpayer states that its statements have not been evaluated by the Food and Drug Administration and that its product is not intended to diagnose, treat, cure or prevent any disease.

The Taxpayer's representative expresses the opinion that the liquid products described are neither beverages nor soft drinks, but are dietary supplements in liquid form. The Taxpayer's representative further states that each ready-to-drink and concentrate product is labeled as a dietary supplement and concludes that such products are not subject to the Tennessee bottler's tax.

## **QUESTION PRESENTED**

Will the [TYPE OF DRINK] in ready-to-drink liquid form, available in [REDACTED] cans, and the [TYPE OF DRINK] in concentrated liquid form, available in [REDACTED] containers fall within the definition of "bottled soft drinks" found in Tenn. Code Ann. § 67-4-402(a)(1) so as to be subject to Tennessee's bottled soft drink tax on manufactures, bottlers, distributors and sellers of bottled soft drinks?

## **RULING**

The [TYPE OF DRINK] in ready-to-drink liquid form, which is available in [REDACTED] cans, falls within the definition of "bottled soft drinks" found in Tenn. Code Ann. § 67-4-402(a)(1), and is subject to Tennessee's bottled soft drink tax.

The [TYPE OF DRINK] in concentrated liquid form, available in [REDACTED] containers, is not within the definition of "bottled soft drinks" found in Tenn. Code Ann. § 67-4-402(a)(1), and is not subject to Tennessee's bottled soft drink tax.

## **ANALYSIS**

### Applicable Statute

Tenn. Code Ann. § 67-4-402, set forth below in its entirety, imposes a 1.9% tax on gross receipts derived from manufacturing or producing and selling bottled soft drinks in Tennessee or from importing bottled soft drinks, or causing them to be imported, into Tennessee from outside the state and selling such imported bottled soft drinks in Tennessee.

(a) DEFINITIONS. As used in this section, unless the context otherwise requires:

(1) "Bottled soft drinks" includes any and all nonalcoholic beverages, whether carbonated or not, such as soda water, cola drinks, orangeade, grapeade, gingerale and the like, and all bottled preparations commonly referred to as soft drinks of whatever kind or description that are closed and sealed in glass, paper, metal, plastic, or any type of container or bottle, whether manufactured with or without the use of syrup. Fluid milk with or without flavoring, natural undiluted fruit juice or vegetable juice, cider, and pure fruit juice concentrate to which no additive has been made, with only water being necessary to be added to restore the juice to its natural state, are exempted from the provisions of this section; and

(2) "Nonalcoholic beverages" means all beverages containing less than one half of one percent (.5%) alcohol by volume.

(b) IMPOSITION OF TAX. A person manufacturing or producing and selling within this state any bottled soft drinks and a person importing or causing to be imported bottled soft drinks into this state from outside the state and selling such imported bottled soft drinks within this state shall, for the privilege of engaging in such business, pay to the state for state purposes an amount equal to one and nine-tenths percent (1.9%) of the person's gross receipts derived from such business.

(1) Notwithstanding any provision of this section or law to the contrary, any revenue generated from the increase in tax rates from one and one-half percent (1.5%) to one and nine-tenths percent (1.9%) shall be allocated to the highway fund for the purpose of funding programs for the prevention and collection of litter and trash and matters related to the programs. No later than March 31 of each year, the department of transportation shall transmit to the governor, the speaker of the house of representatives and the speaker of the senate a report listing the programs receiving funds generated by this subsection (b), the amount of funds received by each program, and the purpose for which the funds were spent.

(2) A person located outside this state who distributes bottled soft drinks in this state shall, for the privilege of engaging in such business, pay the tax on gross receipts derived from bottled soft drinks distributed by the person in this state in the same manner as does a person located in this state.

(3) A person importing or causing to be imported bottled soft drinks into this state from outside the state and selling such imported soft drinks within this state is not required to pay the tax, if the person's out-of-state supplier of bottled soft drinks has paid the tax as stated in subdivision (b)(2).

(4) The tax shall be administered and collected by the commissioner under chapter 1, part 14 of this title and parts 2 and 3 of this chapter.

- (c) EXEMPTIONS. A person who is subject to and pays this tax is not liable for the tax on gross receipts derived from the person's sales of bottled soft drinks outside this state.
- (d) Any taxes paid pursuant to the provisions of parts 20 and 21 of this chapter on the business taxed by this section shall be a credit against the tax imposed by this section.
  - (1) The credit taken on any return shall not, however, exceed seventy-eight and ninety-five hundredths percent (78.95%) of the tax liability shown on any tax return.
  - (2) No credit shall be taken on any return for taxes paid pursuant to parts 20 and 21 of this chapter unless such taxes are paid for the corresponding tax base period on which the tax levied by this section is based; provided, that the credit allowed under this subsection (d) shall be for taxes only, and no credit shall be allowed for penalty and interest.

### Application of the Statute

The most basic rule of statutory construction is to ascertain and give effect to the intention and purpose of the legislature. *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977). Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66 (Tenn. 1991).

The definition of "bottled soft drinks" found in Tenn. Code Ann. § 67-4-402(a)(1) uses the words "beverage," "natural," "undiluted," and "pure," but none of these words are defined in the statute. In seeking to determine the "natural and ordinary meaning" of statutory language, the usual and accepted source for such information is a dictionary. *State v. Givens*, Slip op. 1994 WL406187 (Tenn.Crim.App. Aug. 4, 1994).

In MERRIAM – WEBSTER'S COLLEGIATE DICTIONARY 117 (11<sup>th</sup> ed. 2007), one of the definitions given for the word "beverage" is "a drinkable liquid." Thus, the definition of "bottled soft drinks" is potentially very broad and, without exemptions, would include any liquid that is intended to be consumed by drinking. The statute makes this clear by using the terms ". . . any and all nonalcoholic beverages, whether carbonated or not . . . all bottled preparations commonly referred to as soft drinks of whatever kind or description . . . whether manufactured with or without the use of syrup[.]"

Tenn. Code Ann. § 67-4-402(a)(1) states that ". . . soda water, cola drinks, orangeade, grapeade, gingerale and the like . . ." are examples of beverages that fall within the statutory definition of "bottled soft drinks." However, Tenn. Code Ann. § 67-4-402(a) excludes beverages containing .5% or more alcohol by volume, and beverages that are not sold ". . . closed and sealed in glass, paper, metal, plastic, or any type of container or bottle . . .[.]"

It should be noted that none of the taxable soft drink preparations mentioned in the statute are naturally occurring. In fact, the statute generally excludes from taxation naturally

occurring beverages containing no additives<sup>2</sup>. This is evidenced by the fact that the statute exempts from the bottled soft drink tax “. . . [f]luid milk with or without flavoring, natural undiluted fruit juice or vegetable juice, cider, and pure fruit juice concentrate to which no additive has been made, with only water being necessary to add to restore the juice to its natural state . . . [.]” In *English Mt. Spring Water Co. v. Chumley*, 196 S.W. 3d 144 (Tenn.Ct.App. 2005), the Tennessee Court of Appeals makes it clear that a “beverage,” does not include water in its natural form.

In the *English Mt. Spring Water Co. v. Chumley* decision, the Court pointed out that “[t]he exempted items appear to be characterized by the fact that, although altered in some sense (flavoring added to milk and water removed from concentrated fruit juice) they are naturally occurring substances, and retain that identity as marketed.” The Court also pointed out that bottled water is a naturally occurring substance which retains its identity as marketed and thus bears more in common with the items exempted by Tenn. Code Ann. § 67-4-402(a)(1) than with items subjected to taxation by the statute. The Court further points out that soda water, which is a taxable “bottled soft drink” under the statute, is not in its natural state since it has been altered by carbonation and thus it obtains its identity artificially. *Id.* at 151, 152.

Definitions of the words “pure,” “natural,” and “undiluted” that are used in Tenn. Code Ann. § 67-4-402(a)(1) to describe examples of beverages excluded from the tax confirm that the legislature did not intend to subject to the bottled soft drink tax any naturally occurring substances which retain their identity as marketed. The word “pure” is defined in MERRIAM – WEBSTER’S COLLEGIATE DICTIONARY 1010 (11<sup>th</sup> ed. 2007) as “unmixed with any other matter.” “Diluted” is defined as “to make thinner or more liquid,” or “to diminish the strength, flavor or brilliance by adding mixture” *Id.* at 350. Thus the definition of “undiluted” would be the opposite or reverse of “diluted.” *Id.* at 1358. The word “natural” is defined as “existing in or produced by nature,” “not artificial” or “having a form or appearance found in nature.” *Id.* at 826.

The Taxpayer’s contention that the liquid products described in the Facts are neither beverages nor soft drinks, but are merely dietary supplements in liquid form is not persuasive. Vitamins, minerals and other substances, or combinations of substances, having nutritional value are often added to food and drink preparations, but that does not automatically give them dietary supplement identity or transform them into dietary supplements. The Taxpayer’s web page states that its products are not intended to diagnose, treat, care or prevent any disease and that statements concerning its products have not been evaluated by the Food and Drug Administration. Tenn. Code Ann. § 67-4-402(a)(1) contains the criteria for determining whether drinkable liquids are subject to Tennessee’s bottled soft drink tax.

## Conclusion

The [TYPE OF DRINK] in ready-to-drink liquid form contained in [REDACTED] cans is a “drinkable liquid” and thus is a nonalcoholic beverage sealed in [TYPE OF] containers. It is not naturally occurring, contains many additives, obtains its market identity artificially and

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<sup>2</sup> The statute makes a slight exception to the additive prohibition by allowing flavoring to be added to milk (i.e. chocolate milk) and water to be added to fruit juice concentrate to restore it to its natural state.

does not qualify for any of the bottled soft drink tax exemptions. Therefore, the [TYPE OF DRINK] in ready-to-drink liquid form in [REDACTED] cans falls within the definition of “bottled soft drinks” contained in Tenn. Code Ann. § 67-4-402(a)(1) and is subject to Tennessee’s bottled soft drink tax.

The [TYPE OF DRINK] in concentrated liquid form and in [REDACTED] containers is not a “drinkable liquid” and thus is not a “beverage” when purchased by the customer because it is in concentrated liquid form. After purchase, the customer must mix [AMOUNT] of the concentrate with [AMOUNT] of water to obtain the product in drinkable form. Only when removed from its [REDACTED] container after purchase and mixed with water by the customer does the product become a “drinkable liquid.” Further analysis of the [TYPE OF DRINK] in concentrated liquid form is unnecessary because the product does not fall within the definition of “bottled soft drinks” contained in Tenn. Code Ann. § 67-4-402(a)(1) and is not subject to Tennessee’s bottled soft drink tax.

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**APPROVED:** Charles A. Trost, Commissioner

**DATE:** 1-11-11