

TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 16-03

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee sales and use tax to the sale of various edible products.

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 the taxpayer's detriment.

FACTS

[TAXPAYER] (the "Taxpayer") is located in [STATE] and is a [REDACTED] company that sells products such as [REDACTED].

Specifically, the Taxpayer sells the following products (the "Edible Products"):

- [PRODUCT 1]

- [PRODUCT 2]
- [PRODUCT 3]
- [PRODUCT 4]
- [PRODUCT 5]
- [PRODUCT 6]
- [PRODUCT 7]
- [PRODUCT 8]
- [PRODUCT 9]
- [PRODUCT 10]
- [PRODUCT 11]

A full list of the ingredients for each of these items is attached as [Appendix A](#). All of the Edible Products that the Taxpayer sells are in liquid or solid form and are sold for human ingestion for taste or nutritional value.

RULINGS

Are the Edible Products considered “food and food ingredients” for Tennessee sales and use tax purposes?

Ruling: All of the Edible Products, except for the [PRODUCT 8] and the [PRODUCT 11], are considered “food and food ingredients” for Tennessee sales and use tax purposes and are subject to the Tennessee sales and use tax at the state rate of 5%, plus the local option rate of up to 2.75%. [PRODUCT 8] and the [PRODUCT 11] are not considered “food or food ingredients” and are therefore subject to the Tennessee sales and use tax at the state rate of 7%, plus the applicable local option rate of up to 2.75%.

ANALYSIS

Under the Retailers’ Sales Tax Act,¹ the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales tax, unless an exemption applies. “Retail sale” is defined as “any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.”²

TENN. CODE ANN. § 67-6-102(78)(A) (Supp. 2015) defines “sale” in pertinent part to mean “any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration.”

With certain exceptions, tangible personal property sold at retail in Tennessee is generally subject to the sales and use tax at the state rate of 7% of the sales price.³ Additionally, counties and incorporated cities are authorized to impose a local option sales tax on all items subject to the state sales tax, at a rate of up to 2.75% of the sales price.⁴

¹ Tennessee Retailers’ Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts Ch. 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2013)).

² TENN. CODE ANN. § 67-6-102(76) (Supp. 2015).

³ TENN. CODE ANN. § 67-6-202(a) (2013).

⁴ TENN. CODE ANN. § 67-6-702(a)(1) (2013); *see generally* Tennessee Department of Revenue, List of Local Option Tax Rates, *available at* <http://tn.gov/assets/entities/revenue/attachments/taxlist.pdf> (last accessed February 11, 2016).

Items meeting the definition of “food and food ingredients” under TENN. CODE ANN. § 67-6-102(41) are subject to the sales and use tax at the state rate of 5% of their sales price.⁵ The local option sales tax also applies to sales of “food and food ingredients” at a rate of up to 2.75% of the sales price.⁶

“Food and food ingredients” is defined in pertinent part to mean “substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.”⁷ The term “food and food ingredients,” however, does not include alcoholic beverages, candy, dietary supplements, tobacco, or prepared food.⁸ Such items, therefore, are taxed at the rates applicable to sales of tangible personal property, *i.e.*, a 7% state rate and a local option rate of up to 2.75%.⁹

The Taxpayer represents that all of the Edible Products it sells are generally in liquid or solid form and sold for human ingestion for taste or nutritional value. Consequently, an Edible Product will properly be considered “food and food ingredients” unless it falls within one of the exceptions to the definition. For purposes of this ruling, the relevant exceptions are candy and dietary supplements.¹⁰

“Candy” is “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 shall not include any preparation containing flour and shall require no refrigeration.”¹¹ The term “piece” is not defined by the Tennessee Code or the Tennessee courts for Tennessee sales and use tax purposes.¹² However, a “piece” is commonly understood to be a portion that has the same make-up as the product taken as a whole.¹³ Different individual ingredients and loose mixtures of different items that make up an entire product are not “pieces” as the term is used for purposes of the definition of “candy.” A product comprised of such differing ingredients is therefore not candy for purposes of the Tennessee sales and use tax, even if some of the ingredients would be considered candy on an individual basis.

To be considered as a “dietary supplement,” a product must, among other things, “be labeled as a dietary supplement, identifiable by the supplement facts box found on the label and as required pursuant to 21 CFR 101.36,”¹⁴ which, in turn, requires that the declaration of nutrition information on the label contain the heading “Supplement Facts.” Therefore, if the nutrition label of an Edible Product does not contain the heading “Supplement Facts,” that item is not a dietary supplement for purposes of the Tennessee sales and use tax.

⁵ TENN. CODE ANN. § 67-6-228(a) (2013).

⁶ See *generally* TENN. CODE ANN. § 67-6-702(a)(1).

⁷ TENN. CODE ANN. § 67-6-102(41).

⁸ *Id.*

⁹ TENN. CODE ANN. § 67-6-228(b).

¹⁰ See TENN. CODE ANN. § 67-6-102(41). Note that although alcoholic beverages, tobacco, and prepared food are excluded from the definition of food and food ingredients, those items are not relevant to this ruling and are not further discussed.

¹¹ TENN. CODE ANN. § 67-6-102(9). In order for a product to be treated as containing flour, the product label must specifically list the word “flour” as one of the ingredients. There is no requirement that the flour be grain-based.

¹² The Tennessee Supreme Court has stated that when a statute does not define a term, it is proper to look to common usage to determine the term's meaning. See, e.g., *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 908 (Tenn. 1993); see also *Tenn. Farmers Assurance Co. v. Chumley*, 197 S.W.3d 767, 782-83 (Tenn. Ct. App. 2006).

¹³ For example, a “piece” is commonly understood to be “an object . . . regarded as a unit of a kind or class.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 938 (11th ed. 2003).

¹⁴ TENN. CODE ANN. § 67-6-102(26)(C).

Food and Food Ingredients

[TYPE A PRODUCTS]

[PRODUCT 1], [PRODUCT 2], [PRODUCT 3], and [PRODUCT 4] (the “[TYPE A PRODUCTS]”) are considered “food and food ingredients” for sales and use tax purposes.

The [TYPE A PRODUCTS] are not excluded from the definition of “food and food ingredients.” Specifically, the labels of the [TYPE A PRODUCTS] do not contain the heading “Supplement Facts,” a necessary part of the definition of “dietary supplement.” Therefore, the [TYPE A PRODUCTS] are not “dietary supplements.”

Additionally, although several of the [TYPE A PRODUCTS] contain sugar or an artificial sweetener (sucralose), none of the [TYPE A PRODUCTS] fall within the exception for “candy” from the definition of “food and food ingredients” because the definition of “candy” requires that it be in the form of “bars, drops, or pieces.” The [TYPE A PRODUCTS] are sold in liquid or powder form and, therefore, cannot be classified as “candy.”

Accordingly, the [TYPE A PRODUCTS] are properly characterized as “food and food ingredients” and are subject to the Tennessee sales and use tax at the state rate of 5% and the local option rate of up to 2.75%.

TYPE B PRODUCTS

[PRODUCT 5] and [PRODUCT 6] (the “[TYPE B PRODUCTS]”) are characterized as “food and food ingredients” for sales and use tax purposes.

The [TYPE B PRODUCTS] are not excluded from the definition of “food and food ingredients.” The [TYPE B PRODUCTS] do not come within the exception for “dietary supplements” from the definition of “food and food ingredients” because they do not contain a “Supplemental Facts” box on their labels. Additionally, although the [PRODUCT 5] contains an artificial sweetener (sucralose), neither of the [TYPE B PRODUCTS] fall within the “candy” exception from the definition of “food and food ingredients” because the definition of “candy” requires that the item be in the form of “bars, drops, or pieces.” [TYPE B PRODUCTS] are sold in powder form.

Accordingly, the [TYPE B PRODUCTS] are properly characterized as “food and food ingredients” and are subject to the Tennessee sales and use tax at the state rate of 5% and the local option rate of up to 2.75%.

PRODUCT 7

[PRODUCT 7] is characterized as “food and food ingredients” for sales and use tax purposes.

[PRODUCT 7] is not excluded from the definition of “food and food ingredients.” Specifically, [PRODUCT 7'S] label does not contain the heading “Supplement Facts,” a necessary part of the definition of “dietary supplement.” Therefore, it is not a “dietary supplement.”

Although [PRODUCT 7] is a preparation of sugar and other ingredients in the form of a bar, its list of ingredients contains “peanut flour.” Because the definition of “candy” excludes items that contain flour, [PRODUCT 7] is not properly characterized as “candy.”

Accordingly, [PRODUCT 7] is properly characterized as “food and food ingredients.” Consequently, [PRODUCT 7] is subject to the Tennessee sales and use tax at the state rate of 5% and the local option rate of up to 2.75%.

[PRODUCT 9]

[PRODUCT 9] is considered “food and food ingredients” for sales and use tax purposes.

[PRODUCT 9] does not come within the exception for “dietary supplements” from the definition of “food and food ingredients” because it does not contain a “Supplemental Facts” box on its label. Furthermore, [PRODUCT 9] is not considered “candy” for sales and use tax purposes. Although [PRODUCT 9] contains an artificial sweetener (sucralose), it is not sold in the form of “bars, drops, or pieces,” which is a requirement to be considered “candy.”

Accordingly, [PRODUCT 9] is properly characterized as “food and food ingredients” and is subject to the Tennessee sales and use tax at the state rate of 5% and the local option rate of up to 2.75%.

[PRODUCT 10]

[PRODUCT 10] is characterized as “food and food ingredients” for purposes of the Tennessee sales and use tax.

Although [PRODUCT 10] is sold in pieces, they do not meet the definition of “candy” because they do not contain “sugar, honey, or other natural or artificial sweeteners.” Additionally, the [PRODUCT 10’S] label does not contain the heading “Supplement Facts,” a necessary part of the definition of “dietary supplement” for sales and use tax purposes.

Therefore, [PRODUCT 10] is properly characterized as “food and food ingredients” and is subject to the Tennessee sales and use tax at the state rate of 5% and the local option rate of up to 2.75%.

Candy

[PRODUCT 8]

[PRODUCT 8] is characterized as “candy” for sales and use tax purposes.

[PRODUCT 8] is a preparation of natural or artificial sweeteners (fructose syrup and dextrose) in combination with chocolate (chocolate coating) in the form of a bar. Additionally, [PRODUCT 8] does not contain flour and requires no refrigeration.

Consequently, [PRODUCT 8] meets the definition of “candy” under TENN. CODE ANN. § 67-6-102(9) and therefore is excluded from the definition of “food and food ingredients.”¹⁵ As a result, the [PRODUCT 8] is subject to the Tennessee sales and use tax at state rate of 7% and the local option rate of up to 2.75%.

[PRODUCT 11]

¹⁵ Note that because [PRODUCT 8] meets the definition of “candy,” it is not necessary to address whether it might also meet the definition of “dietary supplement” under TENN. CODE ANN. § 67-6-102(26).

[PRODUCT 11] is considered “candy” for sales and use tax purposes.

[PRODUCT 11] is a preparation of sugar in combination with nuts in the form of pieces. Therefore [PRODUCT 11] meets the definition of “candy,” and therefore does not come within the definition of “food and food ingredients.”¹⁶

Because [PRODUCT 11] is characterized as “candy” under TENN. CODE ANN. § 67-6-102(9), it is subject to the Tennessee sales and use tax at the state rate of 7% and the local option rate of up to 2.75%.

Gary D. Williams
Assistant General Counsel

APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: April 3, 2016

¹⁶ Note that because [PRODUCT 11] meets the definition of “candy,” it is not necessary to address whether they also meet the definition of “dietary supplement” under TENN. CODE ANN. § 67-6-102(26).

**LETTER RULING 16-03
APPENDIX A**

ITEMS SOLD AT RETAIL

[REDACTED]