

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-11(4)S
Sales Tax
February 18, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101129B

On November 29, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether receipts from the sales of the products that it markets and distributes as dietary supplements in the form of ready-to-drink beverages, liquid concentrates, powdered drink mixes, and chews are subject to State and local sales and use taxes.

We conclude that Petitioner's products are dietary foods and health supplements and that receipts from the sales of these products are exempt from State and local sales and use taxes pursuant to Tax Law §1115(a)(1) and 20 N.Y.C.R.R. §528.2(c).

Facts

Petitioner is a California corporation that manufactures and distributes a line of products directly to consumers and through retailers under the name, [REDACTED], that it describes and labels as dietary supplements. The products include: non-carbonated ready-to-drink beverages; non-carbonated liquid concentrates designed to be mixed with water to make a beverage; powdered drink mixes designed to be mixed with water to make a beverage; and individually wrapped, ready-to-eat chews. The products' packaging indicates that they are "fueled by quercetin, a powerful antioxidant" that "works by triggering the body's ability to produce more real energy" or "activates your body's own energy-producing mechanisms." The packaging also includes a list of ingredients; a Supplement Facts chart that states the daily recommended percentage values ("% d.v.") of vitamins contained in the product; and the federally required legal disclaimers that statements made on the label have not been evaluated by the federal Food and Drug Administration and that "[t]he product is not intended to diagnose, treat, cure or prevent any disease."

The products' lists of ingredients vary somewhat depending upon the form of the product, but all contain among other ingredients: quercetin, green tea leaf extract, citric acid, ascorbic acid (Vit. C - 200-260% d.v.), Alpha Tocopheryl Acetate (Vit. E - 100-130% d.v.), Niacinamide (Vit. B3 - 100-130% d.v.), Pyridoxine Hydrochloride (Vit. B6 - 100-130% d.v.), Riboflavin (Vit. B2 - 100-130% d.v.), Thiamine Hydrochloride (Vit. B1 - 100-130% d.v.), and Cyanocobalamin (Vit. B12 - 100-130% d.v.).

Antioxidants, such as quercetin, which is a flavanoid found in many fruits and vegetables, are considered helpful in maintaining good health by inhibiting cell damage that contributes to a variety of diseases and conditions. Quercetin is reported to have an antihistamine and anti-inflammatory effect.

Analysis

All retail sales of tangible personal property are subject to sales tax pursuant to Tax Law §1105(a), unless otherwise exempted. Tax Law §1115(a)(1) provides an exemption for "[f]ood, food products, beverages, dietary foods and health supplements, sold for human consumption...."

The Sales and Use Tax Regulations provide:

Dietary foods and health supplements:

(1) A dietary food is a food for a special dietary use for humans and which bears on the label a statement of the dietary properties upon which its use is based in whole or in part.

(2) Products which are intended to substitute for the ordinary diet, or supplement the ordinary diet, or substitute for natural foods are exempt, when sold for human consumption. Among these are liquid diet products, artificial sweeteners and vitamins.” 20 N.Y.C.R.R. §528.2(c).

As required by the regulations, the labels of Petitioner’s products highlight their dietary properties (i.e. their antioxidant effect), and that they are intended to increase the user’s energy. That they also supplement the ordinary diet or substitute for natural foods is evident from the products’ ingredients and the supplement facts chart that illustrates how the products support nutritional needs by meeting or exceeding the daily requirements for many vitamins considered essential for good health. When sold for human consumption, as Petitioner’s products are, these products are exempt from state and local sales and use taxes. Tax Law §1115(a)(1); 20 N.Y.C.R.R. §528.2(c); See *Mannatech Incorporated*, TSB-A-02(36)S; *Reliv, Inc.*, TSB-A-99(4)S; *Reliv, Inc.*, TSB-A-97(76)S; Cf. TSB-A-10(49)S (Exemption for Red Bull Energy Drinks and Sugar Free Shots denied because the products were not intended to substitute for natural foods or to supplement the ordinary diet by meeting or exceeding the daily recommended values for vitamins and the products’ labels did not contain a statement of dietary properties.)

DATED: February 18, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.