

Rulings of the Tax Commissioner

Document Number: 13-1
Tax Type: Retail Sales and Use Tax
Brief Description: Products do not qualify for the exemption for nonprescription drugs and proprietary medicines
Topics: Exemptions; Medicine and Drugs
Date Issued: 01/04/2013

January 4, 2013

Re: Ruling Request: Retail Sales and Use Tax

Dear *****:

This is in response to your letter submitted on behalf of your client ***** (the "Taxpayer"), in which you request reconsideration of Public Document (P.D.) 11-7 (1/20/11) regarding the application of the retail sales and use tax exemption for nonprescription drugs to various anti-bacterial products sold by the Taxpayer's affiliates. I apologize for the delay in responding to your letter.

FACTS

In P.D. 11-7, the Tax Commissioner denied the Taxpayer an exemption from the retail sales and use tax on the sale of anti-bacterial products sold by the Taxpayer's affiliates that include skin nourishing and softening ingredients and fragrances. The Taxpayer argues that the guidance provided in the Nonprescription Drug Exemption Question and Answer (Q&A) Summary, referenced in P. D. 11-7, reflects the broad application of the nonprescription drug exemption to anti-bacterial products that was intended by the General Assembly at the time of enactment. Based on the Q&A Summary, the Taxpayer believes there is ample support to exempt all consumer over-the-counter antiseptic drugs recognized by the Federal Food and Drug Administration (FDA), as they contain a nonprescription drug and are marketed as such. Accordingly, the Taxpayer believes, that the products in question qualify for the nonprescription drug exemption provided in *Va. Code* § 58.1-609.10 14.

RULING

Virginia Code § 58.1-609.10 14 provides an exemption from the retail sales and use tax for "(i) Any nonprescription drugs and proprietary medicines purchased for the

cure, mitigation, treatment, or prevention of disease in human beings and (ii) any samples of nonprescription drugs and proprietary medicines distributed free of charge by manufacturer, including packaging materials and constituent elements and ingredients."

Subsection b of *Va. Code* § 58.1-609.10 14 provides that "[t]he terms 'nonprescription drugs' and 'proprietary medicines' shall be defined pursuant to regulations promulgated by the Department of Taxation. The exemption authorized in this subdivision shall not apply to cosmetics."

The Virginia courts have consistently required strict construction of tax exemptions. Based on principles established by the courts, Title 23 of the Virginia Administrative Code 10-210-540 provides that exemptions from the retail sales and use tax are strictly construed, *i.e.*, where there is any doubt as to the application of an exemption, the doubt is resolved against the one claiming the exemption. See *Commonwealth v. Community Motor Bus*, 214 Va. 155, 198 S.E.2d 619 (1973). To do otherwise would unjustly broaden the intended scope of the exemptions.

The Department follows the Federal Food and Drug Administration's (FDA) guidelines for guidance in the classification of products for purposes of the cited exemption. Although an item may be classified as a drug by the FDA, products that contain coloring, perfume, or similar additives are considered to be cosmetic or toiletry products, *e.g.*, lipstick, foundation makeup, soaps, and lotions. The anti-bacterial products in question may fall within the definition of an "antiseptic hand wash product" for FDA regulatory purposes; however, to exempt such products that also advertise skin nourishing and softening effects, as well as provide a large selection of fragrances, violates the clear intent of the statute, *i.e.*, to exempt nonprescription drugs and proprietary medicines.

Based on the foregoing and the application of the strict construction rules mandated by the courts, I find no basis to change the ruling in P.D. 11-7. The products in question do not qualify for the exemption for nonprescription drugs and proprietary medicines.

If you have any questions about this ruling, you may contact ***** in the Department's Office of Tax Policy, Appeals and Rulings, at *****.

Sincerely,

Craig M. Burns

Tax Commissioner

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