

HORWOOD MARCUS & BERK
Chartered

Attorneys at Law

180 North LaSalle Street
Suite 3700
Chicago, Illinois 60601

David A. Fruchtman
Direct Dial: (312) 281-1111
Direct Fax: (312) 261-9926
Direct e-mail: dfruchtman@hmbllaw.com

phone: (312) 606-3200
fax: (312) 606-3232

August 18, 2010

BY U.S. Mail and
E-Mail to scott.peterson@SSTGB.org

Scott Peterson
Streamlined Sales Tax Governing Board
42405 Hillsboro Pike
Suite 305
Nashville, TN 37215

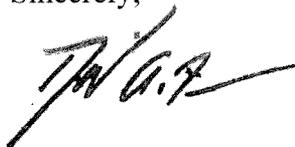
Re: Interpretive/Definition Request

Dear Mr. Peterson:

We are submitting this request for advisory opinion on behalf of our client ("Company").
We are respectfully requesting expedited treatment.

Please do not hesitate to contact me with any questions.

Sincerely,



David A. Fruchtman

DAF/dge
Enclosures

Streamlined Sales Tax Governing Board, Inc.
Compliance Review and Interpretations Committee

INTERPRETATION/DEFINITION REQUEST

Complete each section

1. Name(s) of Requestor(s): David A. Fruchtman
2. Contact Person: Name Same
Address Horwood Marcus & Berk Chartered
180 N. LaSalle Street, Suite 3700
Chicago, Illinois 60601
Telephone 312-281-1111
Email dfruchtman@hmblaw.com
3. Agreement Section(s) involved: Appendix C (definition of "food and food ingredients")
4. Statement of Background Facts (be succinct): Please see attached.

5. Issue: Whether carbon dioxide used to make seltzer for consumption by humans qualifies as "food or food ingredients".

6. Proposed Interpretation: Carbon dioxide qualifies as "food or food ingredients" for sales and use tax purposes.

7. Is expedited consideration requested? No X Yes If yes, please explain why expedited review is requested: We are desirous of obtaining approval from the Governing Board at its October, 2010 meeting.

A request for interpretation/definition normally requires a minimum 60-day comment period. The comment period may be shortened to 10 days if the Committee grants a request for expedited consideration. See Governing Board Rule 902(D) and (H).

8. Date this Request is submitted: August 18, 2010

The Compliance Review and Interpretations Committee meets by teleconference at 10:00 am central every other Thursday. Their schedule can be found at: www.streamlinedsalestax.org under the meeting calendar.

Submit to: Scott Peterson, Executive Director
Streamlined Sales Tax Governing Board
4205 Hillsboro Pike, Ste 305
Nashville, TN 37215
615-460-9332
scott.peterson@SSTGB.org

F0007 Interpretation Definition Request (4/10/08)

August 18, 2010 Interpretative/Definition Request

Facts

Company is a distributor and gas refiller of a table top seltzer making system.

Company's customers initially purchase a table top seltzer making kit, which includes a reusable seltzer dispenser weighing less than five pounds, two reusable plastic bottles, flavor samples and a canister filled with beverage-grade carbon dioxide ("canisters").

The canisters are approximately the size of a half gallon jug of milk and are uniquely adapted to the table top seltzer making kit. For a fee, Company will exchange an empty canister for a full canister. Company also sells full canisters without any exchange when a customer wants to have one or more spare canisters. Company does not charge a separately-stated "deposit fee" with the sale of a spare canister. But, the selling price for a canister with a 1-to-1 exchange of an empty canister is less than the selling price of a spare with no exchange. Company delivers canisters to the customers by United Parcel Service, the United States Post Office or similar package-delivery company.

Customers screw a canister into the table top seltzer dispenser. To make seltzer at any time, a customer fills one of the plastic bottles with tap water, attaches the filled bottle to the dispenser, and pushes a button for one to two seconds, releasing gas into the water. The result is a fresh bottle of seltzer for human consumption. The seltzer is ingested as a beverage. Customers can add flavorings if they desire. The flavorings (orange, ice tea, lemon lime, etc.) are sold by Company in non-drinkable syrup form.

On average, a 60-liter / 14.5 oz. canister can carbonate up to 60 liters of water. When the canister is empty, the customer contacts Company to order a replacement canister. When the replacement canister is delivered to the customer's home, the customer returns the empty canister. Company cleans, inspects, and refills the canister with beverage-grade carbon dioxide for use by another customer.

Customers using Company's table top seltzer making system desire seltzer for their personal consumption. This is the only use for the system.

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Requested Ruling

Company requests a ruling that sales of its canisters of beverage-grade carbon dioxide qualify as sales of “food and food ingredients” as that phrase is used in the Streamlined Sales and Use Tax Agreement (“SSUTA”), Appendix C.

Law and Analysis

The SSUTA defines “food and food ingredients” as “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.”

SSUTA’s listing of a very broad range of forms that food or food ingredients can take is clearly intended to indicate that the form of the item is not determinative of this classification. If an item is ingested or chewed by humans for its taste or nutritional value, it is classified as “food or food ingredients” whatever form it takes.

Under a similar approach, the Federal Food and Drug Administration (“FDA”) recognizes carbon dioxide as a food ingredient. *See* 21 C.F.R. section 184.1240 (“Carbon dioxide”) stating in subsection (c) that “In accordance with section 184.1(b) (1), the ingredient [carbon dioxide] is used in food with no limitations other than good manufacturing practice.” *See also* 21 C.F.R. section 184.1 (“Substances added directly to human food affirmed as generally recognized as safe”) stating in subsection (b) that “Any ingredient affirmed as [Generally Recognized as Safe] in this part shall be used in accordance with current good manufacturing practice. For the purpose of this part, current good manufacturing practice includes the requirements that a direct human food ingredient be of appropriate food grade; that it be prepared and handled as a food ingredient; and that the quantity of the ingredient added to food does not exceed the amount reasonably required to accomplish the intended physical, nutritional, or other technical effect in food.”

As indicated above, Company sells beverage-grade carbon dioxide to be ingested as part of a home-made beverage that the customer makes with the seltzer making system. The carbon dioxide is mixed with water and then is ingested (drunk) by a human.

Carbon dioxide changes the taste of water. This is a matter of common experience, and does not seem to require citations. As anyone one who has tasted carbonated water knows, the addition of carbon dioxide to water changes the taste (and texture) of the water and makes for a pleasant drinking experience.

However, there is also a scientific explanation for why carbonation (the addition of carbon dioxide to water) changes water’s taste. The taste of carbonated water is different than the taste of plain water due to the formation of carbonic acid when the carbon dioxide is dissolved in water. *See e.g.,* Wikipedia for “Soda Water” (explaining that soda water “Soda water, is water which is carbonated and thus made effervescent by

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the addition of carbon dioxide gas under pressure. Soda water gets its name from the sodium salts it contains, added as flavoring and acidity regulators often to mimic the taste of natural mineral water.”).

See also FoodaQ “Why does fizzy/carbonated water taste different to normal water?” (<http://www.foodaq.com/html/Non-Alcoholic-Drinks/32842.html>):

“Question: Why does fizzy/carbonated water taste different to normal water? Ordinary flat water, straight from the tap is nice, and I drink it all the time. However, fizzy water is horrible. I assumed that it was something to with the bubbles, so I have made fizzy water unfizzy, by shaking/stirring etc. But it still tastes horrible, and if anything is worse. Why does fizzy water taste so different to normal water? Why isn't it just normal water with bubbles?

(Answer:) Fizzy water is made by dissolving carbon dioxide in water. The fizz is due to the gas escaping the water. However, especially for cold water, a substantial amount carbon dioxide will still be dissolved in it. Carbon dioxide dissolved in water exists as carbonic acid giving the water a bitter sourish taste. I think when you drank fizzy water, what you tasted was the carbonic acid remaining inside and the minerals that might have been originally present in the water.”

Again, carbon dioxide causes a chemical reaction that changes the taste and texture of water. The carbonated water is ingested by humans precisely because it is carbonated.

Conclusion

For the above reasons, we respectfully request a ruling stating that beverage grade carbon dioxide sold to a consumer for addition to water to carbonated water (aka soda water or seltzer) is food or a food item within the meaning of SSUTA.

If you have any questions, please contact me at (312) 281-1111.