

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

April 2, 1991

Mrs. [B]
Owner/Manager, [F]
XXX --- ---, XXX
--- ---, California XXXXX

RE: S- -- XX-XXXXXX

Dear Mrs. [B]:

Ms. Gaye Jordan of Return Review has referred your letter to her of February 5, 1991, to the Legal Division for a response; it has been assigned to me. At issue is the applicability of sales and use tax to your sales of "LEPPIN" and "EXCEED" products.

I. FACTUAL BACKGROUND

Your letter to Ms. Jordan was apparently written in response to hers to you of January 9, 1991, requesting further information to support your deduction for sales of food products taken on your Third Quarter 1990 Sales and Use Tax Return. You attached to your letter a photocopy of two labels for the LEPPIN product and three labels for the EXCEED products.

(1.) LEPPIN. As you noted in your letter, someone super-imposed one label on another when the copy was made. The smaller label is difficult to read but appears to set forth the product's purpose thusly:

"The ideal quick energy source for housewives, executives, students, drivers, and sportsmen. Promotes physical activity and mental alertness day or night."

(2.) EXCEED. These labels describe three EXCEED products.

(a.) Sports Nutrition Supplement: The purpose of this liquid product is described as follows:

"EXCEED Sports Nutrition Supplement is a complete, nutritionally balanced supplement formulated to help athletes achieve energy, weight, and strength goals

throughout training. EXCEED fits easily in to an athlete's diet as a mealtime supplement, high-energy snack, or pre-event meal."

(b.) High Carbohydrate Source. The label states that this product is a powder. The front says: "After exercise, restores muscle energy and shortens recovery time." The back goes on as follows:

"EXCEED High Carbohydrate Source is a convenient source of nutrition after exercise that provides energy to exhausted muscles."

(c.) Fluid Replacement and Energy Drink. This is a powdered drink mix. The packet included with your letter describes the use of the product, in part, as follows:

"Quickly replenishes energy, fluid and electrolytes.

* * *

"... EXCEED helps prevent dehydration and extends endurance by replenishing energy and water during training and competition."

* * * *

I. OPINION

A. Sales and Use Tax Generally

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 (290 P.2d 201).) "The taxpayer has the burden of showing that he clearly comes within the exemption." Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

Food Products Exemption

Revenue and Taxation Code Section 6359, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for the sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain a list of products which, either singly or in combination, are considered "food products". Regulation 1602(a)(5), however, excludes certain items from the definition of "food products" as follows:

“(5) ‘Food products do not include any product for human consumption in liquid, powdered, granular, tablet, capsule, lozenge, or pill form (A) which is described on its package or label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and to any such product (B) which is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally one or more of the following areas of human nutrition:

1. Vitamins
2. Proteins
3. Minerals
4. Caloric intake”

Regulation 1602(a)(5), subsequently, however, restricts the limitation on the definition of “food products” as follows:

“Tax, however, does not apply to any such products which either are exempted by Section 6369, respecting prescription medicines, or are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and foods providing adequate caloric intake. An example of the latter is a food daily requirement providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the Federal Food and Drug Administration of the following vitamins: A, B1, C, D, Riboflavin, and Niacin or Niacinamide; the following minerals: Calcium, Phosphorus, Iron and Iodine.”

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms – liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then its sales are taxable if one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement, or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories. The subsequent references to “such products” in that subsection refer to products which occur in one of the enumerated forms, not products for which the claims prescribed in subsections (A) and (B) are made.

Based on the above standard, we conclude as follows:

The products in question are in tablet, liquid, and powdered form, so they fall within the ambit of Regulation 1602(a)(5). None of them make claims to be complete dietary foods, and indeed, none supply the user with any protein at all. Only the Sports Nutrition Supplement specifically labels itself as a food supplement. All the products, however, appear to be designed to replace fluids and nutrients (including electrolytes) lost during exercise. We have previously determined that products such as these are food or dietary adjuncts excluded from the definition of "food products" pursuant to the above authority. Accordingly, sales of these products are subject to tax.

For your information, I have enclosed a copy of Regulation 1602. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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Enclosure: Regulation 1602