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Executive Director

June 27, 1995

[X]

Re: [Z]

Dear [X],

This is in response to your letter dated April 24, 1995, in which you inquired whether your product qualify as food products for human consumption pursuant to Regulation 1620.

Your company, [Z] manufactures and distributes two products, one is described as a powdered drink mix and the other as a bar product. You describe the powdered drink mix as follows:

“The powdered drink mix is listed as a food supplement on the package but it is a meal substitute nutritional product, which is a total nutrient. It was scientifically engineered to enable users of the product to benefit from all of the positive bio-chemical effects of food on a regular basis for improved health, fitness and vitality.”

The bar product is described as “similar in looks to a candy bar [and] loaded with nutrients to improve health, fitness and vitality.”

The label on the Met-Rx powdered drink mix describes the product as a total nutrition food and contains the following language on the back of the package “NOTICE: Use this product as a food supplement only.” The label on the Met -Rx bar product does not make any nutritional claims, nor does it state that the product is a food supplement. A comparison of the labels reveals that each product contains different ingredients and that the caloric and nutrient compositions are also different.

Retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempted by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) Retailers may collect sales tax reimbursement from the purchaser if the contract of sale provides for the reimbursement. (Civ. Code § 1656.1.)

Generally sales of food products for human consumption are exempt from sales tax pursuant to Revenue and Taxation Code section 6359. However, this section specifically provides that certain items are specifically excluded from the definition of food products for

human consumption. These exclusions are explained in subdivision (a) of Regulation 1602 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 described 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...”

The last paragraph of Regulation 1602 (a) (5) then provides the following limitation to the above quoted exclusion from the definition of “food products”:

“Tax, however, does not apply to any such products which either are exempted by Revenue and Taxation Code 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 regulations of the Federal Food and Drug Administration of the following vitamins: A, 81, C, D, Riboflavin, and Niacin or Niacinamide; and the following minerals: Calcium, Phosphorus, Iron and Iodine.”

In other words, an item will not qualify as a food product, **unless** it is considered a complete dietary food, and its sale will be taxable if: 1) it is liquid, powdered, granular, tablet, capsule, lozenge, or pill; and 2) (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.

Since the Met-Rx drink is sold in powdered form, and is described as a food supplement, it does not meet the definition of a “food product” found in the first paragraph of Regulation 1602 (a)(5). An examination of the nutritional components of this product reveals that this drink mix does not contain the requisite caloric, protein, and vitamin values to qualify as

a “complete dietary food” per the last paragraph of Regulation 1602 (a)(5). Therefore, pursuant to the provisions of Regulation 1602 (a) (5) tax applies to sales of this product.

We have previously determined that food bars are not products sold in one of the seven forms excluded from the definition of “food products” per Regulation 1602 (a) (5) and are considered to be comparable to candy and are, therefore food products pursuant to Regulation 1602 (a)(1). This conclusion is illustrated in California Business Taxes Law Guide (BTLG) Annotation 245.1205.5 (3/11/91) which discusses the classification of fiber bars.

“Fiber bars are not taxable dietary supplements since they are not preparations in liquid, powdered, granular, tablet, capsule, lozenge and pill form. (Regulation 1602 (a)(5)). Fiber bars are food bars, comparable to candy, which is one of the products defined as ‘food products’ by Regulation 1602(a) (1), the sales of which are exempt from tax.”

Thus, based on the foregoing, the sales of the Met-Rx bars are exempt from tax.

I have enclosed a copy of Regulation 1602 for your review. If you have any further questions, please feel free to contact this office again.

Sincerely,

Patricia Hart Jorgensen
Senior Tax Counsel

PHJ:cl

Enclosure