

**STATE BOARD OF EQUALIZATION**

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August 8, 1991

Mr. [L]  
XXXX --- Drive, Suite XXX  
--- ---, California XXXXX

RE: [T].  
S- -- XX-XXXXXX

Dear Mr. [L]:

I am responding to your letter of May 30, 1991, and our recent telephone conversation. You have requested reconsideration of our opinion, as expressed in my letter to [T] of May 9, 1991, that the ToppFast Replacement Meal Drink (hereinafter "the Drink") was a dietary supplement excluded from the definition of the term "food products" under Regulation 1602(a)(5).

You did not send any labels or promotional literature with your letter. As I recall, the brochure that was available to me at the time of my previous letter indicated that ToppFast Meal Replacement products were recommended for fast weight loss, and, when used according to the directions supplied, would give an intake of 600 calories. The customer could, however, combine certain products to provide 960 calories to achieve slower weight loss or weight maintenance but that the Meal Replacement Drink, if used as the sole source of nutrition, would yield less than 900 calories.

Based on those criteria, we concluded that the Drink was not a complete dietary food. Even though the customer could combine certain ToppFast products to achieve an intake of more than 900 calories, that is true with any diet product. We must go by the maker's recommendations as to the product at issue. Thus, we re-iterate our previous opinion that the Drink is a dietary supplement excluded from the term "food products" by Regulation 1602(a)(5) with the result that its sales are subject to tax.

My letter also discussed the ToppKrisp High Fiber Meal Replacement product. We note that AB 2180 (Stats. 1991, Ch. 85, § 8) has made meal replacement bars subject to tax as fabricated snacks. Therefore, I rescind the conclusion to the contrary contained in my previous letter.

Mr. [L]

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You asked for information on the procedures to request a formal administrative review of this subject in the event that the new information you supplied did not cause an alteration of our previous opinion. In our recent telephone conversation, you stated that [T] sells its product through independent retailers. Since sales tax is paid at the retailer level, the only method to obtain a formal review of this matter is for at least one [T] retailer to pay the tax and then submit a claim for refund.

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

JLW:es