



**STATE BOARD OF EQUALIZATION**

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October 11, 1989

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Dear Mr. ---:

Your June 2, 1989 letter to Senior Tax Representative --- --- has been referred to me for a reply. In it you state:

"Please provide us with a written opinion as to whether the following products qualify for exemption from sales tax under California Sales Tax Law section 6358, California regulation sections 1587 or 1588, or any other applicable section of the California Sales Tax law:

- "1. PRO-SERVE-This is a silage treatment. It promotes faster fermentation of silage while controlling the ensiling temperature. It reduces problems like protein damage and runoff, slows the decay and deterioration of silage exposed to air and preserves the nutrients in the silage, so that the animals get the most from the feed. It is my understanding that Pro-Serve is registered as a 'feed' in your state.
- "2. PRO-SERVE II-This is a forage treatment. It acts as a natural preservative and allows farmers to bale their hay at higher moisture levels when it is most likely to retain nutrient-rich, leafy material. It also results in hay that is more palatable to the livestock. I also believe that Pro-Serve II is registered as a 'feed' in your state.
- "3. AMPLIFY -D-This is a seed emergence aid. It adds an extra source of energy (adenosine monophosphate) to enhance seedling vigor (which improves the speed of emergence) and aid in establishing a good plant stand. It also enables the seed to better survive stress conditions such as cold, wet weather.

"Enclosed is an agricultural exemption certificate which we have designed based on your regulations. May we use this form for California purposes? If not, how should we modify it to meet your requirements?"

In California, except where sales are specifically exempted by statute, sales tax applies to the gross receipts of retailers from all retail sale of tangible personal property in this state (Rev. & Tax. Code § 6051). Statutory exemptions which may apply to the products you describe are in Revenue and Taxation Code Section 6358, Animal life; seeds; plants and fertilizer, as interpreted and applied by Regulation 1587 and 1588.

Regulation 1587, Animal Life and Feed, copy enclosed, states in pertinent part:

"(b) FEED.

"(1) DEFINITION. The term 'feed' as used herein includes codliveroil, salt, bone meal, calcium carbonate, double purpose limestone granulars and oyster shells, but does not include sand, charcoal, granite grit, sulphur and medicines. It also includes any item which is purchased for use as an ingredient of a product which would constitute a feed where the product itself sold.

"(2) APPLICATION OF TAX.

"(A) In General. Tax does not apply to sales of feed for food animals or for any non-food animals which are to be sold in the regular course of business."

Regulation 1588, Seeds, Plants, and Fertilizer, copy enclosed, states in pertinent part:

"(b) FERTILIZER.

"(1) DEFINITION. The term 'fertilizer' includes commercial fertilizers, agricultural minerals, and manure. The terms 'commercial fertilizers' and 'agricultural minerals' as used herein are defined in Sections 14516 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code .... The term 'fertilizer' does not include ...'auxiliary soil and plant substances' as ... defined ... in Section 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code ....

"(2) APPLICATION OF TAX. Tax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be used as food for human consumption or sold in the regular course of business. Tax does not apply to sales of fertilizer to be applied to land the products of which will be used as feed for livestock and poultry of a kind the products of which ordinarily constitute food for human consumption or are to be sold in the regular course of the purchaser's business."

Food and Agricultural Code Section 14513, "Auxiliary soil and plant substance," referenced above, states:

"'Auxiliary soil and plant substance' means any chemical or biological substance or mixture of substances or device distributed in this state to be applied to soil, plants, or seeds for soil corrective purposes; or which is intended to improve germination, growth, yield, product quality, reproduction, flavor, or other desirable characteristics of plants; or which is intended to produce any chemical, biochemical, biological, or physical change in soil; except that it shall not include commercial fertilizers, agricultural minerals, [---] poisons, soil amendments, or manures. It shall include the following...

"(g) Any similar product or device intended to be used for influencing soils, plant growth, or crop or plant quality."

Revenue and Taxation Code Section 6007 defines a retail sale as a "sale for any purpose other than resale in the regular course of business in the form of tangible personal property." Regulation 1525, Property Used in Manufacturing, which interprets and applies the code, states in pertinent part:

"Tax applies to the sale of tangible personal property to persons who purchase it for the purpose of use in manufacturing, producing or processing tangible personal property and not for the purpose of physically incorporating it into the manufactured article to be sold. Examples of such property are machinery, tools, furniture, office equipment, and chemicals used as catalysts or otherwise to produce a chemical or physical reaction such as the production of heat or the removal of impurities."

As you did not provide product labels or brochures, my response is qualified by certain assumptions which are based on the information in your letter. The first product you mention, Pro-Serve I, is a silage treatment. I assume Pro-Serve I has a continuing effect on the silage after the sale, i.e., reduction of protein damage, slowing decay and preservation of nutrients. In other words, Pro-Serve is added to silage, has continuing functions which effect the silage, and remains in the silage when the silage is then sold for feed to food animals or for any non-food animals which are to be sold in the regular course of business. The Board has previously concluded that a similar product, Hylage Forage Saver qualifies as an exempt feed under Revenue and Taxation Code Section 6368 and Regulation 1587. (See Business Taxes Law Guide Anno. 110.0820, 4/17/68). Applying Regulation 1587(b) to this situation, assuming Pro-Serve remains in the silage at the time of sale, we consider Pro-Serve to be an ingredient of the silage. Accordingly, Pro-Serve is an exempt feed when it is sold to be used as an ingredient of products which are themselves feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or are to be sold in the regular course of business (Rev. & Tax. Code §6358(b); Reg. 1587).

Pro-Serve II, the next product you note, is a forage treatment. I assume Pro-Serve II is added to hay, has some effect on the physical or chemical properties of the hay which allows farmers to bale their hay at higher moisture levels thereby making for a more nutritious, palatable product.

The Board has consistently held that products that facilitate the production of hay can be distinguished from those that treat silage. Ensilation is an ongoing process that continues for a period of time after the addition of the treatment. The production of hay is complete after the hay is dried and baled. The production of hay is considered analogous to a manufacturing operation and thus by applying Regulation 1525 (above) to the facts at hand, our opinion is that Pro-Serve II is used in producing hay and not for the purpose of physical incorporation into the product. As a product used in manufacturing, sales tax applies to sales of Pro-Serve II. The following instances of previous holdings by Board Staff are consistent with this conclusion.

For example, products sold for use in preventing the growth of bacteria and mold and the prevention of heat during curing of hay are regarded as sold for a purpose other than resale and are subject to tax although the cured hay may be sold (BTLG Anno. 110.1260, 7/5/50). In addition, Business Taxes Law Guide Annotation 110.0640, 6/4/53 states, "[a] crop preserver added to hay at the time of baling for the purpose of retarding bacterial action is not within the feed exemption and in reality is a manufacturing aid used to expedite the baling of hay. As such, it is subject to sales tax."

Please note that the registration of a product as a feed with the Department of Food and Agriculture does not classify a product as a feed for sales and use tax purposes. Although the Board looks to various other state agencies when pertinent (including the Department of Food and Agriculture) to further the consistent application of state laws, the tax status of a product is ultimately determined by the application of the Sales and Use Tax Law.

The final product upon which you request a written opinion is Amplify D, a seed emergence aid. Amplify D is a chemical substance (adenosine monophosphate). I assume it is applied to either the soil or the seed, and is intended to improve the germination, growth or other desirable characteristics of plants (emergence and seedling vigor). Regulation 1588 specifically excludes auxiliary soil and plant substances, as defined in Food and Agricultural code Section 14513 from the tax exemption for fertilizer. In our opinion, Amplify D, which you state enhances seedling vigor, improves the speed of emergence and aids in establishing a good plant stand, is an auxiliary plant substance as defined in Food and Agricultural Code Section 14513 and therefore does not qualify for tax exempt treatment under Regulation 1588.

Lastly, you request an opinion as to the suitability of an agricultural exemption certificate designed by --- (copy attached). While there is no official form required to be used as an exemption certificate, a form is suggested in Regulation 1687(c) for exempt sales of feed customarily used both to feed food animals and non-food animals. However, the example suggested in the Regulation is worded to cover food animals only. Please note that modification would be necessary for the sales of feed for non-food animals that are raised for resale. The

Board will accept any document as an exemption certificate so long as it contains a statement by a purchaser, in writing to a seller that the property purchased will be used in a manner or for a purpose entitling the seller to regard the gross receipts from the sale as exempt from sales tax. Please note that although there is no explicit provision in Regulation 1587 that permits the use of blanket exemption certificates for the sale of exempt feed, there is language in the regulation that does so impliedly (see language of Exemption Certificate example in Reg. 1587(c)((1)). Hence, ---'s good faith acceptance of a timely blanket exemption certificate would support ---'s claim of tax-exempt status for feed sales covered by the blanket certificate in the event of an audit.

If you have any further questions, please feel free to write again.

Sincerely,

Howard Weinberg  
Tax Counsel

HW:cl  
Enclosures