



**STATE BOARD OF EQUALIZATION  
LEGAL DIVISION (MIC:82)**

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October 19, 1994

BURTON W. OLIVER  
*Executive Director*

Mr. [H]  
XXXX --- ---  
---, California XXXXX

Re: S- -- XX-XXXXXX  
Non-tobacco Chew

Dear Mr. [H]:

I am responding to your letter to the Legal Division dated July 27, 1993. You indicate your belief that sales of your product, [G] are exempt from tax. You state that the product is "an herbal chew and it contains absolutely no tobacco."

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 PO.2d 201.]) "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption.

Section 6359, as interpreted and implemented by Regulation 1602, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Sub-divisions (1) (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered "food products." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As amended by Proposition 163, effective December 1, 1992, the term "food products" includes gum.

C. Tax Consequences.

You do not include a description of the product itself beyond stating that it contains no tobacco. We assume that it is not made of gum because you do not indicate that it is. While it may, be chewed and not swallowed, it is not gum. The statute specifically includes gum within the list of food products items, but not products that are functionally like gum. Under the above authority, the Board cannot classify something as gum that is not gum. Therefore we conclude that your sales of [G] herbal chews are subject to tax.

For your information, I have included a copy of Regulation 1602. I hope the above discussion has answered your question. If you have additional information regarding your product, please do not hesitate to write again.

Sincerely,

John L. Waid  
Tax Counsel

JLW:es

Enclosure: Reg. 1602

cc: -- - District Administrator