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September 2, 1997

[C]
 [M]
 XXXX --- ---
 --- ---, California XXXXX

Re: [M]
 SR -- XX-XXXXXX

Dear [C]:

Your letter dated July 10, 1997 was referred by the Return Analysis Section to the Legal Division for response on August 22, 1997. On April 29, 1997, your letter of December 1, 1996 was forwarded to the Legal Division for response. By letter dated June 30, 1997, we responded to your questions regarding the application of tax to sales of five products, *Dr. Hagiwara's Green Magma*, *Dr. Hagiwara's Wheat Germ Extract*, *Dr. Hagiwara's Green Essence*, *Dr. Hagiwara's Beta Carrot*, and *AIM Barleygreen*. In your July 10 letter, you note that we concluded that the first four of the products listed above do not qualify as food products, while the other product, *Barleygreen*, would qualify as a food product unless sold as a supplement. You state: "All these products are under the same manufacturer, moreover, the ingredients are almost the same source of food materials. If *Barley Green* is qualified as a food product, the other four will be the same." Rather than simply discuss the point you make now, below I provide you a full analysis of the applicable rules. This letter therefore supersedes and replaces our letter to you of June 30, 1997.

Sales of food products for human consumption are exempt from tax under Revenue and Taxation Code section 6359 unless excluded from the exemption by that statute. The relevant exclusions are set forth in subdivision (c):

"For purposes of this section, 'food products' do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts."

The first step of this analysis is to determine whether a product is sold as a medicine. If so, it does not qualify as a food product. The sale of an item sold as a medicine is subject to tax unless qualifying for the prescription medicine exemption explained in Regulation 1591. Whether a product is sold as a medicine is determined based on the label on the product as well as product literature that may be given to purchasers and potential purchasers in order to market it as a medicine. The information you have provided does not indicate that any of the five products in question are sold as medicines.

Since it appears that these products are not sold as medicines, the form in which the products are sold is relevant to determine if it is excluded from the definition of food product. A product does not qualify as a food product if it is sold in liquid, powdered, granular, tablet, capsule, lozenge, or pill form if either: 1) the product is described as a food supplement, food adjunct, dietary supplement, or dietary adjunct on its labels or packaging, or 2) the product is prescribed or designed to remedy a specific dietary deficiency or to increase or decrease generally the intake of vitamins, protein, minerals, or calories. Since all five products are powders and thus are in one of the listed forms, this determination is required, which is explained in subdivision (a)(5) of Regulation 1602:

“‘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

“In determining whether a product falls within category (B), it is important whether the manufacturer has specially mixed or compounded ingredients for the purpose of providing a high nutritional source. For example, protein supplements and vitamin pills are taxable as food supplements.

“Other items, such as cod liver oil, halibut liver oil, and wheat germ oil, are considered dietary supplements and thus subject to tax even though not specially compounded. However, unusual foods such as brewer's yeast, wheat germ and seaweed are not subject to tax except when their label states they are a food supplement or the equivalent. Finally, the compounding of nutritional elements in items traditionally accepted as food does not make them taxable, e.g., vitamin-enriched milk and high protein flour.”

If the label or other product literature accompanying the package containing a product in one of the listed forms (such as your powdered products) makes supplement claims, the product does not qualify as a food product and its sales are subject to tax. For example, if someone sells garlic powder with labeling indicating that the product is a supplement, that garlic powder cannot qualify as a food product. On the other hand, if there is no “supplement claims” on the label or other literature accompanying the product, the garlic powder would not be excluded from the definition of food product under this test. Thus, it is possible for four of your products sold in powdered form to be excluded from the definition of food products based on labeling while another similar product might not be so excluded.

The four *Dr. Hagiwara's* products include a brochure that discusses all four products. This brochure repeatedly refers to the products formulated by Dr. Hagiwara, and these four specifically, as supplements. For example, a heading on page 12 states “Convenient-to-Use Powdered Supplement” followed by a discussion of each of the four products. Thus, based on this brochure alone, these powdered products are sold as supplements and are excluded from the definition of food products. In addition, the packaging of each product refers to the product contained therein as a supplement (Wheat Germ Extract, Green Magma, and Green Essence when mixed each become a “supplemental beverage” and Beta Carrot when mixed becomes a “beta carotene supplement”). Sales of these four products do not qualify for the food products exemption without regard to how tax applies to Barleygreen, which I discuss below.

Even if the labeling or accompanying brochures of a product do not describe it as a supplement, a product in one of the listed forms will also fail to qualify as a food product if the product is prescribed or designed to remedy a specific dietary deficiency or to increase or decrease generally the intake of vitamins, protein, minerals, or calories. Unlike the determination required for subdivision (a)(5)(A) of Regulation 1602 which looks only to labeling or other literature accompanying the product, the determination required by (a)(5)(B) is similar to that required to determine whether a product is sold as a medicine in that the product label, packaging, and brochures and other product literature that may be given to purchasers and potential purchasers help determine whether a product is prescribed or designed for these purposes. As quoted above, subdivision (a)(5) of Regulation 1602 sets forth other considerations used to determine if a product will be regarded as prescribed or designed for these purposes without regard to whether there are any such claims on product literature.

The label of Barleygreen shows a different manufacturer and distributor from the other four products. However, similar to the other products, there is a picture of Dr. Hagiwara on the packaging, and a description of his background and his development of the product. It states that “the secret to Barleygreen’s popularity worldwide is Dr. Hagiwara’s patented processing method based on the long time accumulation of scientific and technical experiences, which delivers the dynamic nutrients to you intact.... Although many others have tried to copy Barleygreen, none have ever succeeded” The packaging also includes the instructions: “One teaspoon twice per day is an average serving. You may increase or decrease your daily serving.”

The presence of instructions on a product label regarding when or how much of the product to take is an indicator that the product is meant as a supplement, but the total

circumstances must be considered. Here, the instructions do indicate how much of the product to take, indicating that the product is intended as a supplement. In addition, the packaging includes a pictogram describing the "Healthy Cell Concept" which again indicates that this product is intended as a supplement. Finally, it does not appear that there can be any doubt that the product is "specially mixed or compounded ingredients for the purpose of providing a high nutritional source." As the package indicates, Dr. Hagiwara spent years studying nutrients and developing this product formulation comprised of barley juice, brown rice, kelp, and malodextrine for the purpose of delivering "the dynamic nutrients" intact; others have attempted to copy this specially formulated product, but have failed. Thus, we conclude that Barleygreen is a powdered product designed to increase one of the areas of human nutrition listed in subdivision (a)(5)(B) of Regulation 1602, and it is therefore excluded from the definition of food product by that provision. Its sales are subject to tax.

In summary, we conclude that since the four "*Dr. Hagiwara's*" products are powdered and described on their labels as supplements, they do not qualify as food products. We conclude that since Barleygreen is a powdered product that is specially designed to increase one or more areas of human nutrition, it too fails to qualify as a food product.

Thank you for supplying us with a complete set of packaging and brochures so that we are able to give you advice based on the actual facts pertaining to these products. If you have further questions, please feel free to write again.

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: --- --- District Administrator (--)
Mr. Jay A. Gould (MIC:35)