

M e m o r a n d u m**245.1206**

To: F. Abaeze
Auditing, Culver City District

Date: October 29, 1991

From: John L. Waid
Tax Counsel

Subject: Food Products (Reg. 1602(a)(5))

The Legal Division has asked me to respond to your memorandum to it of October 15, 1991. You have asked for our opinion regarding the application of sales and use tax to a taxpayer's sales of certain food products.

According to your memorandum, your office is auditing a taxpayer that sells these products over the counter. The taxpayer provides no facilities on the premises for consumption of these products. You attached to your memorandum labels and packages which describe the products. The products are made by Gold's Nutritionalysis.

OPINION**A. Food Products Exemption**

Revenue and Taxation code Section 6359, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for the sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain a list of products which, either singly or in combination, are considered "food products." Regulation 1602(a)(5), however, excludes certain items from the definition of "food products" 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 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”

Regulation 1602(a)(5), subsequently, however, restricts the limitation on the definition of “food products” as follows:

“Tax, however, does not apply to any such products which either are exempted by 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, B1, C, D, Riboflavin, and Niacin or Niacinamide; the following minerals: Calcium, Phosphorus, Iron and Iodine.”

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms – liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, its sales are taxable if one of the two following conditions also occurs: (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, proteins, minerals, or calories. The subsequent references to “such products” in that subsection refer to products which occur in one of the enumerated forms, not products for which the claims prescribed in subsections (A) and (B) are made.

B. Tax Consequences

Based on the above standard, we conclude as follows:

1. Metabolic Optimizer High Energy Performance Bar. The label designates this product as a meal replacement or meal supplement and states that it supplies per serving 190 calories and 33% of the minimum RDA of vitamins and minerals. Emergency Regulation 1602(a)(4)(B)(1), as currently drafted, defines food bars as “fabricated snacks” the sales of which are taxable. The regulation is currently being revised to exempt “meal replacement bars” which, per serving as defined by the manufacturer, supply at a minimum 250 calories and 25% of the minimum RDA of vitamins and minerals. Because this product only supplies 190 calories per serving, it does not qualify as a “meal replacement bar” with the result that its sales are subject to tax.

2. Metabolic Optimizer Formula. This is a powdered drink mix. The label states that it supplies “a more potent and highly concentrated source of branched-chain amino acids ... plus energizing carbohydrates and medium-chain tri-glycerides” [emphasis in original] along

with “high-potency vitamins, minerals and electrolytes, essential fatty acids, antioxidants, optimizers, and peak performance nutrients.” The label also has instructions on use of the product for weight gain or loss. If used as the sole source of nutrition, it provides only 351 calories and 31 grams of protein per day. The label thus indicates that this product is designed to increase the intake of vitamins and minerals before and after exercise or to effect weight gain or loss. It does not supply enough calories and protein to qualify as a complete dietary food. Therefore, this item does not qualify as an exempt food product under the above regulation; its sales are subject to tax.

3. 100% Pure Milk/Egg Protein Powder. This is a powdered drink mix which the label designates a “High (P.E.R.)formance Protein Powder Specifically Formulated to Enhance the Muscle Building Process” and “an excellent protein drink supplement.” We have previously considered such protein supplements to be excluded from the term “food products.” (See Annot. 245.1270.) Sales of this product are subject to tax.

4. Weight Loss Powder. This is a powdered drink mix which the label describes as a “Meal Supplement/Meal Replacement Nutritional Drink Mix Formulated to Help Promote Natural Weight Loss.” It supplies 300 calories and 72 grams of protein per day. The label thus designates this product as both a meal supplement and weight-loss formula. Pursuant to the above authority, its sales are subject to tax.

5. High Performance Weight Gainer Formula. This is a powdered drink mix which the label describes as a “Concentrated Drink Mix Specially Formulated to help Maximize Weight Gain and Overall Strength.” It supplies 970 calories and 36 grams of protein per day. It is thus a food product in powdered form designed to effect weight gain. Under the above authority, its sales are subject to tax.

JLW:es