

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
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September 16, 1991

Mr. [C]
[P]
XXXXX --- ---
--- ---, California XXXXX

RE: S- -- XX-XXXXXX

Dear Mr. [C]:

The Legal Division has been asked to respond to your letter to the State Board of Equalization dated August 5, 1991, and it has delegated that responsibility to me. You have requested advice regarding the applicability of sales and use tax to certain food items which you sell.

I. FACTUAL BACKGROUND

You describe your business as follows:

“I sell the complete range of Uni-Vite products, tapes, videos, and other educational material that are subject to tax, and the range of food products which includes shakes, soups, bars, muesli, chili, and pasta’s which are each used as a complete meal to totally replace ordinary food.

“Each of these meals contains 35% or more of all the RDA recommended nutrients as well as other trace elements, and in combination these foods provide over 100% of the RDA recommended proteins, vitamins, amino acids and trace elements.”

You do not include any labels or brochures describing individual items, so I cannot render an opinion as to a specific product. I can, however, discuss sales taxes as applied to these products generally.

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

B. 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 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, then 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, protein, 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.

C. Tax Consequences

Based on the above standards, we conclude as follows:

1. Uni-Vite Bar. We had previously considered that food bars were analogous to candy bars which are listed as “food products” in Regulation 1602(a)(1) and so not subject to tax. However, the Legislature recently enacted Section 6359(c)(2) (Stats. 1991, Ch. 85, §8) which makes sales of “fabricated snacks” subject to tax. Since the snack food industry appears to consider meal bars as fabricated snack foods, we conclude that these products are excluded from the definition of “food products” under the above statute with the result that sales of these items are now subject to tax.

2. Muesli, Pasta, Chili, and Soups. These products are usually described as dehydrated cereal, pasta, stew and soup products, respectively. Regulation 1602(a)(5) states that it does not apply to items traditionally accepted as food even though other nutritional items have been compounded in. Although they probably contain a high proportion of powder, these items represent products traditionally accepted as foods. Cereal, flour products, and soup are among the items defined as “food products” under Regulation 1602(a)(1). Therefore, despite the fact that these products are designed to decrease caloric intake, their sales are exempt from tax under the above authority.

3. Shakes. This is usually a powdered drink mix sold for the purpose of weight loss or maintenance. As a result, we have previously concluded that such Drinks are powdered products produced or designed to decrease caloric intake, and are excluded from the definition of a "food product" under Regulation 1602(a)(5). Their sales are thus subject to tax.

For your information, I have enclosed a copy of Emergency Regulation 1602. 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

Enclosure: Emergency Reg. 1602

cc: Mr. O. A. McCarty – Supervisor Return Review