

M e m o r a n d u m**245.1419**To: Ms. Barbara Edd
Return Review

June 6, 1991

From: John L. Waid
Tax CounselSubject: [W]
[K]
S- -- XX-XXXXXX

The Legal Division has assigned your memorandum of April 23, 1991, to me for a response. You have requested advice regarding the application of sales and use tax to the taxpayer's sales of certain Cambridge Diet products.

The taxpayer (hereinafter [K]) is a distributor of Cambridge Diet products. In response to your letter of February 26, 1991, which you wrote requesting justification for [K]'s line 5 deductions for the 2nd and 3rd Quarters of 1990, the taxpayer sent copies of labels for the following Cambridge Diet products: Food for Life Hearty Chicken and Tomato Soups; Food for Life Super Oats; Food for Life Strawberry, Vanilla, Chocolate, and Festive Eggnog Drinks; and Food for Life Chocolate shake. Five of these products are drink mixes. Two are soups, and one – the Super Oats – is apparently a dehydrated cereal. Except for the Super Oats, which supplies 160 calories, each of the products supplies the consumer 140 calories per serving. All of the labels identify the Food for Life line as "The Ultimate Weight Loss Formula", and the Directions contain the following statements:

"The Food for Life Ultimate Weight Loss Formula is a delicious, nutritious, balanced, low calories food, which provided 100% of the U.S. RDA of all vitamins, minerals and protein as well as trace elements and electrolytes at levels recommended by the National Academy of Sciences for good health in only 420 calories per day.

* * *

"The Food for Life Ultimate Weight Loss Formula is designed for use as a sole source of nutrition for periods of not to exceed two consecutive weeks, unless on a physician-monitored program."

The Directions contain other admonishments about use of the products to "speed weight loss". If the products were used as the sole source of nutrition consumed as the day's three meals, they would supply 420 calories and 46 grams of protein.

[K] did not send the labels you requested for the products "Maintain for Life," "Body Balance," or "Food for Life Meal Replacement Bar" which you had requested. [K] claimed in the accompanying letter that those products had been reviewed by the Salinas District Office during an audit of [A], the owner of Cambridge Diet, and were classified as food products. You indicated in your memorandum that you had reviewed the [A] file and found no evidence to confirm that statement.

OPINION

Regulation 1602 sets up a two step analysis: (1) Does the product occur in one of seven forms? (2) If so, is it labeled as a food supplement, dietary adjunct, etc., or is it designed to regulate the intake of calories, vitamins, minerals, or protein? If the answers to both questions are "yes", the product is excluded from the definition of "food products" with the result that its sales are subject to tax unless, of course, some other exemption applies. Additionally, we have long recognized that if the product occurs in one of the specified forms, and absent some other exemption being applicable, its sales will be taxable if it is generally recognized to be a dietary supplement or a weight loss product, even if it is not described as such on its label and does not emphasize its vitamin, protein, mineral, or caloric content. If, however, the product, though subject to one of the criteria above, is a "complete dietary food", supplying a daily intake of at least 900 calories, 70 grams of high quality protein, and the minimum RDA of vitamins and minerals, it is considered to be "food product". In such a case, the sales of the product are exempted from tax.

Based on the above criteria, we conclude in the case of the specific Food for Life products at issue as follows:

(1) Soups, Super Oats. Because soups and cereals are listed as "food products" in Regulation 1602(a)(1), we are of the opinion that they are to be considered as food products occurring in dehydrated form. Therefore, the sales of these items are exempt from tax.

(2) Drinks and Shake. These are powdered products. The labels you supplied clearly state that these products are for short-term use for the purpose of weight loss. Not only do the labels designate the products as dietary adjuncts, but the products are designed for the purpose of weight loss and also do not supply enough protein and calories to be termed "a complete dietary food". Therefore, these products are excluded from the definition of "food products" by both prongs of Regulation 1620(a)(5) with the result that their sales are subject to tax.

(3) Meal Replacement Bar. We have previously determined that sales of this product are exempt because a food bar is not one of the product forms to which Regulation 1602(a)(5) applies. Note that if SB 5X, proposing to tax candy and snack foods, becomes law this product will become subject to tax as a fabricated snack.

(4) "Body Balance" and "Maintenance for Life." The taxpayer provided no information on these products. My research indicates that no written opinion determining the products to be exempt food products has been issued. If they are in one of the forms to which Regulation 1602(a)(5) applies, sold for the purpose of weight loss, and do not supply an average daily intake of at least 900 calories and 70 grams of protein, then they are excluded from the term "food products" by the above regulation with the result that their sales are subject to tax.

JLW:es
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cc: Mr. O. A. McCarty, Supervisor, Return Review