

**STATE BOARD OF EQUALIZATION**

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February 28, 1991

Dr. S--- I. J---, M.D., P.C.
XXXX N. --- --- St., Suite XX
---, CA XXXXX

Dear Dr. J---:

I am writing this to correct our opinion regarding the sales and use tax consequences of your sales of products which are a part of "The Amazing Micro Diet Plan" as previously expressed in a letter of Senior Tax Counsel Ronald L. Dick to you dated July 17, 1990. The further research we have done on this matter pursuant to opinion requests from other Micro Diet Distributors has caused us to modify the advice previously given you.

PLEASE TAKE NOTICE that the opinion expressed in Mr. Dick's letter is hereby rescinded and is superceded by the opinion set forth below. You may no longer rely on Mr. Dick's letter in the event of an audit.

The Product Information sheet you supplied indicates that Micro Diet distributors sell Micro Food Bars, Micro Muesli cereal, Micro Chili, Micro Soups, Micro Pasta, and Micro Drinks. The literature you included indicates that the diet typically provides 100% of the Minimum Recommended Daily Allowance of vitamins and minerals, 66 grams of protein, and 630 calories, and further indicates that the dieter should use Micro Diet products as the sole source of nutrition for no more than three weeks running.

I. 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."

(Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

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 Micro Bar: We have previously considered that food bars are analogous to candy bars which are listed as "food products" in Regulation 1602(a)(1). Because the Uni-Vite Micro Bar is not in one of the forms of food products to which the strictures of Regulation 1602(a)(5) apply, its sales are exempt from tax.

2. Micro Muesli, Micro Pasta, Micro Chili, and Micro Soups. These products are 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 they are designed to decrease caloric intake, sales of these items are exempt from tax under the above authority.

3. Micro Drinks. This is a powdered drink mix. Although the label does not make weight-loss claims, the brochure makes it clear that the Micro Diet plan is designed specifically for weight loss or maintenance. Indeed, the product is sub-titled "The Micro Diet Drink Range." As a result, we conclude that Micro Drinks are excluded from the definition of a "food product" under Regulation 1602(a)(5) and that its sales are subject to tax.

As noted above, Micro Diet products typically provide only 66 grams of protein and 630 calories, and can be used as the sole source of nutrition for only three weeks. Besides to the short-term use, the amount of protein and calories are well below the standard set for tax-exempt "complete dietary foods" set by Regulation 1602(a)(5) and so do not qualify Micro Diet products as such.

There is another route by which your sales of the Micro Drink might be exempted. We have previously considered that, while medicines are not "food products" under Regulation 1602(a)(4), food products may be "prescription medicines" if furnished under the proper circumstances. We have previously determined that items which are ordinarily considered "food products" are furnished by physicians to their patients during the course of treatment, they qualify as "prescription medicines" as that term is used in Regulation 1591(b)(1). Perhaps you furnish the Micro Diet products as part of a physician-supervised weight-loss regime which you have prescribed to treat other health problems of the patient, such as high blood pressure. Assuming that you do, your sales of these products would be exempt from tax, and your purchase of these items from your distributor, if any, would be exempt from tax under Regulation 1591(a)(4).

Physicians must hold seller's permits unless they sell only exempt prescription medicines or unless by virtue of making a lump sum charge to the patient they are consumers. Since we have determined that your sales of Micro Drink are not exempt from tax, you must obtain a seller's permit. The address and telephone number of your local Board of Equalization Field Office are as follows:

31 East Channel Street, Room 264
P.O. Box 1890
Stockton, California 95201-1890
(209) 948-7720

For your information, I have enclosed a copy of Regulations 1591 and 1602. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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Enclosure: Regulation 1591 & 1602