

**STATE BOARD OF EQUALIZATION**

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May 9, 1991

[X]
XXXX --- --- #XX
---, CA XXXXX

RE: S- -- XX-XXXXXX

Gentlemen:

By memorandum of March 22, 1991, Ms. L. Salcedo of Return Review has requested that I write you on this matter. You have apparently requested advice as to the taxability of sales of two of [X]'s, products: the Toppfast Replacement Meal and the ToppKrisp Nutritional High Fiber Meal. Ms. Salcedo included with her memorandum two labels of the former product and a packet and brochure for the latter.

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.”

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 to [X]

Based on the above standard, we conclude as follows:

1. ToppKrisp Nutritional High Fiber Meal Replacement. The package Ms. Salcedo sent did not have any of the product inside nor did the brochure describe it. From the brochure's reference to convenience and the fact that it apparently does not need to be mixed with anything, we assume that it is a product similar to a wafer, cracker, or cookie. If so, the product does not occur in one of the forms to which Regulation 1602(a)(5) applies, and crackers and bakery products are listed as "food products" in sub-division (a)(2). We therefore conclude that this product qualifies under the regulation as a "food product" the sales of which are exempt from tax.

2. Toppfast Diet Plan Meal. These products are powders which must be mixed with water to be consumed. The label describes them as follows:

"The Toppfast Diet Plan is a delicious, nutritious, metabolically-balanced diet meal. It has been developed by a physician who has medically supervised thousands of fasting patients under clinical conditions."

The two labels included are for a chicken soup and a vanilla drink.

We have previously considered that diet products such as dehydrated soup are food products listed in Regulation 1602(a)(1) occurring in dehydrated form. As such, they are distinguished from powdered products to which sub-division (a)(5) applies. Therefore, sales of the soup are exempt from tax. Sales of the drink mix are, however, subject to tax as it is a powdered product the label of which states that it is sold for weight loss purposes.

For your information, I have enclosed a copy of 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

Enc.: Regulation 1602

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