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April 7, 1994

Ms. [P]
Senior Manager, --- --- ---
XXX --- --- ---
--- ---, California XXXXX

Re: S- – XX-XXXXXX
[S]

Dear Ms. [P]:

I am responding to your letter to Assistant Chief Counsel Gary J. Jugum dated May 11, 19XX. You asked for a legal ruling on the application of sales and use tax to sales by your client, [S], of herbal concentrate products. We note that the Board staff cannot issue tax rulings; only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a given set of facts.

You indicate that [S] is a network marketing company which sells herbal food concentrate products, beauty aids, and various promotional items through a network of distributors. You attached a list of products that is too voluminous to analyze on a product-by-product basis. You do, however, break them down into fourteen categories which are more manageable for the purpose of discussion. Therefore, I will confine my analysis to the categories but will mention specific products where they either differ from the general rule for the category or we have designated their sales as taxable or exempt in previous correspondence with [S]. You also attached copies of product packages and labels for our review.

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 the

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

B. Food Products Exemption

Various statutes, interpreted and implemented by Regulations 1602 and 1603, provide exemptions from sales and use taxes for sales of food products for human consumption under certain circumstances. Subdivisions (1) and (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered "food products." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) Sub-division (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 restricts this 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) thus 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.

Effective July 15, 1991, Section 6359(c)(2) excluded “snack foods” from the list of “food products.” As interpreted and implemented by Regulation 1602(a)(4)(B)1, “snack foods” included items known as “fabricated snacks,” which included food bars. However, the regulation excluded from that definition “meal replacement bars” which contained, per serving as defined by the manufacturer, at least 250 calories and 25% of the minimum RDA of vitamins and minerals. This section was repealed effective December 1, 1992, with the passage of Proposition 163.

3. Tax Consequences to [S].

A. Herb Capsules.

We have previously determined that herbs and herbal products sold in capsule or tablet form are “unusual foods” under the regulation and so qualify as food products unless a medicinal claim is made or the product is described on its label as a food supplement or the equivalent. (Annot. 245.1350.) Each label for these products carries the legend: “Drink as tea at meal time.”

While this phrase could be taken to mean to drink the product while having a regular meal, thus indicating use as a food supplement, we do not consider it definite enough to be taken as a statement that these products are food supplements. We thus consider them to be exempt food products under Regulation 1602(a)(1) with the result that their sales are exempt from tax.

I am concerned also that, at least in some cases, you may not have been supplied complete labels. I note that your product list includes Korean White Ginseng, Siberian Ginseng Root Bark, Dong Quai, Dandelion Root, Alpha 20C, Lifestream, and Conco, that we had previously determined to be food supplements or medicines due to their labelling. At least one of the QUINARY labels is incomplete in that one of the statements on the label extends beyond the copy page. For these reasons I cannot render a definitive opinion on these products.

B. Herb Concentrates.

These are liquid products which could be subject to Regulation 1602(a)(5). See,

Response to Item # 1.

C. NuPlus Bulk/Package.

This is a powdered product which is made from various fruits and herbs. Although this product contains fruit and fruit products are listed as foods in Regulation 1602(a)(1) and fruit juices are listed as food products in sub-division (a)(2), sub-division (a)(5) provides a limitation on the items which would be considered "foods" in those sub-divisions. (Annot. 245.1250.) However, see Response to Item # 1.

D. [S]Bars.

You describe these as individually wrapped "'granola-type'" food bars. Because a "food bar" is not one of the seven forms to which Regulation 1602(b)(5) applies, they are not excluded from the list of "food products" by that section. During the period July 15, 1992, through November 30, 1992, however, food bars were considered to be "fabricated snacks" subject to the exclusion for "snack foods." During that time period, sales of such products were subject to tax. However, prior to July 15, 1991, and again beginning December 1, 1992, sales of food bars were and are not taxable.

E. [S].

You state that this product is a mouthdrop. The copy of the flyer you enclosed states that it is sold for the purpose of freshening breath. We have previously concluded that halitosis is a medical condition. Regulation 1602(a)(4) excludes "medicines" from the definition of "food products." As it is not sold or furnished to the consumer by one of the methods authorized under Regulation 1591(a), sales of this product are subject to tax.

F. Calli Beverage.

This product is an herb packet which is steeped in water to make an herbal tea. The label, while stating that the product is good for the consumer's "health and beauty," makes no specific medicinal claims. Sales of herb teas the packets or labels of which make no medicinal or dietary-supplement claims are exempt from tax under Regulation 1602(a)(1). (Annot. 245.1350.)

G. Fortune Delight.

You enclosed a copy of apparently a box of packets. The box lists the herbal ingredients but says nothing about the product otherwise. If the individual packets do not make medicinal claims for the product or designate it as a food supplement, it qualifies as a food product the sales of which are exempt from tax under Regulation 1602(a)(1).

H. Electrosport.

This is a liquid product which the package recommends be mixed with water to be consumed. You indicate it comes in a box of 30 15ml. bottles. The copy of the box you sent me says nothing about the product, but you state in your letter that this is a “drink mix designed to help replenish fluids, electrolytes and minerals lost during strenuous exercise. We have previously determined that such products are specially formulated by the manufacturer for the purpose of providing a high nutritional source. (Reg. 1602a)(5); Annot. 245.1140.) Its sales are subject to tax.

I. Evergreen.

This is a liquid product which is added to another liquid in order to be consumed. You state in your letter that it “is ... designed to help fortify the blood with added zinc and minerals.” This product not only is designed to increase the body’s intake of minerals but also appears to be making medicinal claims. Herb beverages that make medicinal claims or are designed to increase the intake of minerals are excluded from the definition of “food products” under Regulation 1602(a)(4) & (5). (Annot. 245.0500.). Sales of this product are subject to tax. One of the ingredients is chlorophyll. We have previously determined that Liquid Chlorophyll is a food supplement when its label or package makes medicinal claims. (Annot. 245.1230.)

J. [S] Combination Packs.

You state that these packs include various [S] products, which may include herbal food capsules, herbal concentrates, herbal beverages, and/or beauty care products, and are sold for a single price. The rule regarding taxation of sales of is set forth in Regulation 1602(b) as follows:

“When a package contains both food products (e.g., dried fruit) and nonfood products (r.g., wine or toys), the application of tax depends upon the essential character of the complete package. If more than 10 percent to the retail value of the complete package, exclusive of the container, represents the value of the nonfood merchandise, a segregation must be made and the tax measured by the retail selling price of such nonfood merchandise.”

You attached copies of either labels or boxes from several of these Packs. Since there is no breakdown of the value of the food v. the non-food items, I cannot render an opinion on the taxability of individual Packs. I do note that some of them have considerable non-food value in them. For example, the [S] 1 Pack contains NuPlus Herb Food Concentrate, Calli Herb Food Beverage, and QUINARY CAPS Herb Food Concentrate, all likely food products, but it also contains herbal skin care, balm, and oil products, all non-foods. The latter group seems to make up a significant amount of the value of the [S] pack 1. Thus, under the regulation, the entire value of the Pack may be taxable.

K. Nutritional Supplements.

You state that [S] sells various vitamin and mineral supplements in capsule and tablet form. You recognized that sales of such products are subject to tax under Regulation 1602(a)(5).

L. Aloe Vera Juice.

The label states it is to be taken "as an addition to the everyday diet." Since the label describes this product as an adjunct to the daily diet, its sales are subject to tax under Regulation 1602(a)(5). (Annot. 245.0030.)

M. Vitalite Snacks.

The label describes these products as "Dried Seasonal Fruits and Vegetables." Regulation 1602(a)(1) specifically lists dehydrated vegetables as food products, and we have previously concluded that dehydrated foods generally are to be considered as "food products" the same as their regular form. Sales of these products are exempt from tax.

N. Dr. Chen's Secret Sauce.

You describe this product as a "Barbecue sauce made from all natural ingredients" Regulation 1602(a)(1) lists "sauces" as food products. Sales of this product are exempt from tax.

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

cc: --- District Administrator

A "medicinal claim" on the product label is no longer used as a basis for differentiating a food product from a medicine. Please see Annotation 245.0724 (11/17/08). RDT. 7/2/09.