



## STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA  
 (P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)  
 (916) 324-3828

WILLIAM M. BENNETT  
 First District, Kentfield

BRAD SHERMAN  
 Second District, Los Angeles

ERNEST J. DRONENBURG, JR.  
 Third District, San Diego

MATTHEW K. FONG  
 Fourth District, Los Angeles

GRAY DAVIS  
 Controller, Sacramento

December 14, 1992

BURTON W. OLIVER  
 Executive Director

Mr. [O]  
 [N]  
 XXX --- --- ---  
 ---, California XXXXX

Re: S- -- XX-XXXXXX  
 Edge Bar

Dear Mr. [O]:

I am responding to your letter to the Legal Division dated November 18, 1992. You asked if sales tax applies to your company's sales of a product known as the Edge Bar. You sent a flyer describing the product as well as two samples. The Edge Bar appears to be a food bar. One bar supplies 234 calories, 25% of the minimum RDA of protein, and varying percentages of other vitamins and minerals. The flyer and the packages state that the Edge Bar supplies "High efficiency protein with Branched Chain Amino Acids" and "Balanced simple and complex carbohydrates...."

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

Mr. [O]

-2-

December 14, 1992  
245.1203

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) & (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 subsequently 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.

Since 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.

For your information, I have included 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

Enclosure: Reg. 1602