

M e m o r a n d u m**245.1269**To: Mr. G. L. Jordan
Return Review

Date: June 5, 1991

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

Your memorandum of April 16, 1991, to the Legal Division has been assigned to me for a response. Since the taxpayers have not requested an opinion, I am writing directly to you.

The taxpayers are apparently retailers of health food products. In response to your letter to them of February 5, 1991, regarding their line 5 deductions for the Fourth Quarter of 1990, the taxpayers sent brochures describing three of the products that they sell: Probioplex, DDS Acidophilus, and Barley Essence Barley Powder. You have requested advice as to whether or not these products qualify for the food products exemption from sales tax provided by Regulation 1602.

OPINION**B. Food Products Exemption**

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, 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, proteins, minerals, or calories. In addition, products for which medicinal claims are made are excluded from the term “food products” by Regulation 1602(a)(4).

Based on the above standard, we conclude as follows:

(1) Probioplex. This is a powdered product which the label describes as a dietary supplement. The sales of this product are subject to tax pursuant to the above regulation.

(2) DDS Acidophilus. According to the brochure, DDS Acidophilus, when consumed before meals, aids in food digestion and in correcting digestive disorders, is a natural

laxative, helps correct lactose intolerance, prevents bad breath, reduces cholesterol, corrects acne problems, and prevents traveler's diarrhea. As it is a product for which the label makes specific medicinal claims, sales of DDS Acidophilus adjunct are subject to tax.

(3) Barley Essence Barley Powder. The brochure indicates that this is a powdered health food made from brown rice and the dried juice of the barley plant. It describes the product as "nature's, concentrated whole food, containing Vitamins, Minerals, Amino Acids, active Enzymes, and Chlorophyll for complete balanced nutrition." This product is not described on its packaging as a food or dietary supplement or adjunct, nor does it make any medicinal or weight-loss claims. We have previously concluded that this product qualifies as a vegetable juice product the sales of which are exempt from tax under Regulation 1602(a)(2).

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