

M e m o r a n d u m**245.1364**

To: Mr. Gordon D. Seames

Date: April 18, 1991

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

Your memorandum of March 12, 1991, to the Legal Division has been assigned to me for a response. You have requested an opinion as to the applicability sales and use tax to the sales of several items.

The taxpayers consider that a number of the items they sell are "food products," the sales of which are exempt from tax under Regulation 1602. You enclosed several product labels which the taxpayers presumably have supplied to support their claim.

These labels describe the products at issue as follows:

(1) Exceed Products: Sports Nutrition Supplement, High Carbohydrate Source, and Fluid Replacement and Energy Drink: For reasons that will become apparent, no product description is necessary here.

(2) Finhalsa. The label describes this product as follows: A nutritious Meal Replacement Bar."

(3) Gatorlode High-Energy Carbohydrate Mix. This product is a powder which must be mixed with water to be consumed. The label describes its purpose in part, as follows: "Gatorlode Drink Mix is a great tasting, concentrated source of carbohydrates to supplement your diet before or after vigorous workouts. Gatorlode Drink Mix supplies energy to help you achieve a higher level of endurance. This product supplies 0 grams of protein.

(4) Body fuel 750. This is a powder which must be mixed with water to be consumed. The label calls it a "Natural Energy Replacement Drink Mix for Endurance Athletes. It goes on to describe the purpose of the product as follows:

"Body fuel 750 is a high-performance fluid and carbohydrate replacement drink. It was developed for the ultra-endurance athlete - the triathlete, the runner or the cyclist - who makes strenuous long term physical demands on the body in training or in an event lasting two hours or more.

* * *

Body fuel 750 helps prevent the dangerous effects of electrolyte depletion which may occur during endurance exercise. While it is detrimental to replace all of the electrolytes lost in sweat, adequate amounts of sodium and potassium are necessary.”.

The label notes that the product provides 280 calories per serving and 0 grams of protein.

OPINION

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, the next question is whether or not 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? If the answer to either part of the last question is yes, the product is excluded from the definition of food products - with the result that its sales are subject to tax unless, of course, some other exemption applies. Additionally, we have long recognized that if the product occurs in one of the specified forms, and absent some other exemption being applicable it will be taxable if it is generally recognized to be a dietary supplement or a weight loss product, even if it is not described as such on its label and does not emphasize its vitamin, protein, mineral, or caloric content. If, however, the product, though subject to one of the criteria above, is a “complete dietary food”, supplying a daily intake of at least 900 calories, 70 grams of high quality protein, and the minimum RDA of vitamins and minerals, it is considered to be “a food product”. In that case, the sales of the product are exempt from tax.

Based on the above standard, we conclude as follows:

(1) Exceed Products: We have previously concluded that the Exceed products in question do not qualify as food products under Regulation 1602(a)(5), for the reasons discussed below. Their sales are subject to tax.

(2) Finhalsa. We have previously concluded that food bars such as this are products which do not occur in one of the seven forms to which Regulation 1602(a)(5) applies. We have likened these products to candy, which is listed in Regulation 1602(a)(1) as a “food product”. Sales of this product are not subject to tax.

(3) Gatorlode Drink Mix and Body fuel 750. These products are in powdered form, so they fall within the ambit of Regulation 1602(a)(5). None of them make claims to be complete dietary foods, and indeed, none supply the user any protein at all. Only the Gatorlode Drink Mix specifically labels itself as a food supplement. All the products, however, appear to be designed to replace fluids and nutrients (including electrolytes) lost during exercise. We have

previously determined that products such as these are food or dietary adjuncts excluded from the definition of "food products" pursuant to the above authority. (Annot. 245.1140.) Accordingly, sales of these products are subject to tax.

JLW:es