

245.1416.350

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

**To :** Ms. K. W. Barrow (MIC:35)  
Return Review Section

**Date:** March 3, 1995

**From :** John L. Waid  
Tax Counsel

**Subject:** [G]  
Account No. S- -- XX-XXXXXX  
"Super Tea"

I am responding to the memorandum you sent to the Legal Division dated December 10, 1994, regarding this taxpayer's sales of three products: Apricot Oat Cake, Super Tea, and Diet Snapple Peach Flavored Ice Tea. Attached to your memorandum was a copy of the taxpayer's letter to you dated November 28, 1994 (in response to yours to the taxpayer of October 17, 1994), attached to which are copies of the labels for these products.

**OPINION**

As you know, Regulation 1602(a)(5) excludes certain items from the definition of "food products." It 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.

1. Oat Cake. A cake or bread form is not one of those covered by the regulation. As a result we have previously concluded that such things as food bars and energy bars, despite their use as diet aids, do not come within the exclusion of subdivision (a)(5), with the result that their sales are exempt from tax.

2. Snapple Diet Ice Tea is a tea that has been sweetened with an artificial sweetener (aspartame). We have previously determined that such artificial sweeteners are food products. (Annot. 245.1420.) The tea is not sold as part of a weight maintenance program, and the word "diet" merely refers to the artificial nature of the sweetening. This is a food product under Regulation 1602(a)(1).

3. Super Tea Natural Energy Drink. The label describes this product as follows:

“SUPER TEA is the ultimate, energy, workout drink, of the 90’s. It contains a unique formula with 100 grams of super high quality, 100% natural carbohydrates. SUPER TEA incorporates the Carbohydrate Stacking Principle.... We add to this 2900 mg. of Pharmaceutical grade Caffeine, Chromium and the electrolytes Potassium and Magnesium (from Succinates) for the most complete and powerful product of its kind anywhere.

[¶]

“DIRECTIONS: Drink before or during a workout or any strenuous activity for every, or following activity to enhance recovery.”

We have previously determined that such drinks are specifically compounded to provide a high source of minerals and electrolytes. Such products are excluded from the term “food products” under Regulation 1062(a)(5), with the result that their sales are subject to tax.

JLW:sr

cc: San Francisco District Administrator - BH