



STATE BOARD OF EQUALIZATION

(916) 445-6493

December 22, 1983

Mr. [I]
[F]
Attorneys at Law
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Dear Mr. [I]:

This is in reply to your letter of October 14, 1983 to Mr. Lucian Kahn, Senior Tax Representative, of our Out-of-State District office, in which you protest the staff's position, as was stated in Mr. Kahn's letter of August 26, 1983, that Ideal Snacks does not qualify as a tax-exempt "food product."

"Ideal Snacks" is a product derived entirely from vegetable sources and milk by-products and is sold in tablet form.

It is your contention that the sale of Ideal Snacks is not subject to California sales and use tax because it falls within the category of traditional foods, such as milk and vegetable products, and that the compounding of these ingredients does not make them taxable. In the alternative, you argue that Ideal Snacks does not fall within the exclusions of Section 5 of Sales and Use Tax Regulation 1602.

We have reviewed the product guide and marketing literature for Ideal Snacks. Although this product has several recommended uses, the primary recommended use is for weight control, i.e., for either weight loss or weight gain. The product guide and marketing literature indicate that Ideal Snacks is prescribed and designed to increase or decrease the user's caloric intake. Therefore, pursuant to subsection (a)(5)(B) of Sales and Use Tax Regulation 1602, we are of the opinion that Ideal Snacks does not qualify as an exempt "food product", and the sale and use of this product in this state is subject to tax.

California Sales and Use Tax Law imposes a tax on the sale or use of tangible personal property in this state, provided the sale or use is not otherwise exempt from tax. Section 6359 of the Revenue and Taxation Code exempts from tax the sale of and the storage, use, or other consumption in this state of “food products” for human consumption. Included within the definition of “food products” under section 6359 are milk and vegetable products. Although a product for human consumption, such as a milk or vegetable-based product, may fall within a category which is generally exempt from sales and use tax, tax will apply to the sale of this product if (1) it is sold in either liquid, powder, granular, table, capsule, lozenge, or pill form, and (2) it is sold as a dietary supplement (Section 6359).

Sales and Use Tax Regulation 1602 was promulgated to carry out the Legislature’s intent manifested by Section 6359. This regulation provides necessary guidelines to determine whether or not a particular food item is sold as a dietary supplement or adjunct. For the purpose of interpreting and applying the exception for dietary supplements, Regulation 1602(a)(5) provides, in relevant part, that the term “food products” does 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...”

“In determining whether a product falls within category (B), it is important whether the manufacturer has specifically mixed or compounded ingredients for the purpose of providing a high nutritional source. For example, protein supplements and vitamin pills are taxable as food supplements.”

You contend that subsection (a)(5) of this regulation provides a two-part test for products excluded from the definition of “food products.” We disagree. A food item may be excluded from the term “food products” under either subsection (a)(5)(A) or (a)(5)(B) of Regulation 1602. Additionally, since the marketing and product guide literature for Ideal Snacks is replete with recommendations urging the use of this product for the purpose of weight control, we find little merit in your claim that this product is not prescribed or designed to increase or decrease the user’s caloric intake.

The product guide literature states that Ideal Snacks may be used for weight control, energy, less fatigue, reduced stress, stamina, food storage, and in-between meal snacks. Although this guide enumerates the possible uses for this product, the guide’s main emphasis is on “Weight Control.” Under this particular topic heading, it is recommended that where large weight adjustments are

desired, the user should initially take “12-15 Snacks per day for three days” while consuming plenty of liquids and no other meals or food. Supposedly, this regimen “will cleanse...[the user’s] digestive tract and probably afford a loss of 5-7 lbs.” After this initial weight loss, the guide recommends:

“...the suggested normal weight control regime of eating two regular meals per day while substituting a total of 6-8 Snacks for your third meal as well as all between-meal snacks. If you prefer to eat only one meal, eat as many Snacks as it takes to satisfy you...Remember, the more Snacks you eat, the less food you will want to eat.

“This formula was developed for people who need to control their weight and still maintain maximum levels of strength and endurance....

“These ultra nutritious food Snacks provide all essential vitamins and minerals; protein for strength, dextrose and lactose for fast energy and essential fatty acids for lasting endurance. With only about 20 calories per Snack, these compact, lightweight all food tabs will supply the strength needed for any strenuous activity requiring energetic effort and stamina. Keep in mind, the average adult man needs about 2,400 calories per day, women a little less. So by consuming anything less than 2,400 calories per day, you lose weight; anything more, you gain.

“These Snacks are designed to replace one or more meals (according to particular plan and your individual body) as well as all between-meal snacks, while still providing nutrition and energy the body requires. Between-meal snacks, along with overeating at regular meals, are generally the major reasons individuals have difficulty controlling their weight. By replacing snacks with these Snacks, you will not only avoid a high caloric intake, but you will find that you will not become hungry and will eat less at your regular meals.” (Emphasis added.)

This product literature clearly shows that Ideal Snacks is designed and prescribed to decrease the user’s caloric intake. In order to initiate the Ideal Snacks weight control diet, the user is directed to take 12-15 snacks a day for three days with no other food intake. Since each snack contains 20 calories, this recommended dosage represents approximately 240-300 calories per day: a decrease of 90 percent from the user’s normal daily requirement of 2,400 calories per day. During the “normal weight control regime,” the user is told to substitute a total of 6-8 snacks for his third meal of the day. This recommended dosage represents an approximate decrease of 85-90 percent from the user’s normal caloric intake during this third meal. Consequently, in light of this evidence, we remain of the opinion that Ideal Snacks does not qualify as an exempt food product under section 6359 of the Revenue and Taxation Code and Regulation 1602, and that the sale and use of this product is subject to tax.

You request that we forward to you appropriate sections regarding the appeal process and any forms or procedures that are necessary to implement an appeal from our decision in this matter. We are enclosing for your reference a copy of our Hearing Procedures Regulations. As described in this regulation, you can request a hearing before the Board and appeal the staff's decision in this matter after the Board has issued a notice of determination of the amount due, or upon payment of the tax and denial of a claim for refund.

You also request an index of our previous decisions interpreting the "food products" exemption under Regulation 1602. We are enclosing for your reference the Board's pamphlet No. 31, "Tax Tips for Grocery Stores" which discusses the application of tax to "food products." The Board also publishes in the "Business Taxes Law Guide- - Sales and Use Tax Annotations" a compilation of the annotated written opinions given by the legal staff to taxpayers. This publication can be purchased from the Board by contacting our Forms Management Unit, at 1225 R Street, Sacramento, California 95814, telephone 916-445-6180. Annotations of our opinions are also found in commercial tax services, such as those published by the Commerce Clearing House and Prentice-Hall.

If you have any further questions concerning this matter, please write this office.

Very truly yours,

Charles J. Graziano
Tax Counsel

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Encl.