

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

245.1253

In the Matter of the Petition
for Redetermination Under the
Sales and Use Tax Law of:

[X]

Petitioner

DECISION AND RECOMMENDATION

This matter came on regularly for hearing in [X], California, on April 11, 1975.

Appearing for the taxpayer were [A], Attorney at Law, [B], Certified Public Accountant of the firm of [C], President and Chairman of the Board.

Protested Item
(Period 1-1-71 to 3-31-74)

	Measure
Sales of dietary supplements claimed as exempt food products.	\$1,412,190

Contentions of Taxpayer

1. F.D.A. regulations apply to these products as food.
2. The products are not specifically called dietary supplements in the sales literature nor does the label specifically state each product is a dietary supplement.
3. Regulation 1602 contains listings of products which are exempt food products. Some of these products contain ingredients which are substantially the same as our protein products.
4. Regulation 1602 states that "food products" include milk and milk products, including ice cream, ice milk and ice cream and ice milk novelties, sherberts, imitation ice cream and imitation ice milk, dried milk products, sugar or milk, milk shakes, malted milks, and any other similar type beverages composed of at least in part of milk or a milk product and requiring the use of milk or milk products in their preparation. Our products contain dried milk products. These products are handled by freight carriers as "dry milk products."

5. Our suppliers are selling similar products to other organizations who are not charging tax.
6. [D], past president of [X], visited the Board of Equalization in [city] early in 1968 and was informed that the protein products were exempt food products. Consequently, protein sales were treated and reported as exempt food products commencing in the first quarter of 1968.
7. A prior audit covering the quarters 1-67 through 4-70 covered the food sales deduction but did not disallow the deduction nor raise a question which would lead us to believe we were improperly applying the sales tax law.

Summary of Petition

The taxpayer is a corporation engaged in the sale of food or food supplements, cosmetics and cleaners. It operates as a Revenue and Taxation Code section 6015 retailer, and is, therefore, responsible for retail sales of its products to California consumers.

The product involves the application of the sales tax to four separate products marketed by the taxpayer which have been denied exemption as food products. They are:

1. Pro-Snax (tablet form)
2. Ease Hi-protein (powder form)
3. Super Ease Hi-protein food (powder form)
4. Gloda Hi-protein powder (powder form)

A history of the taxpayer's method of reporting these products is set forth in the declaration of [F], the former office manager of the petitioner, a true photocopy of which is attached hereto marked Exhibit A and is incorporated herein by reference.

At the preliminary hearing the taxpayer's representative offered to prove that each of the powdered products provide less than 50 percent of the minimum protein requirement and are, therefore, classified as general purpose foods under tentative regulations promulgated by the Federal food and Drug Administration (Part 125 of 21 CFR and Part 80 of 21 CFR), and exempt food products within the meaning of Revenue and Taxation Code section 6359.

It was pointed out that the powdered products are hardly palatable unless mixed with a liquid such as milk, fruit juice, vegetable juice, etc. It is thus reasoned that the property is sold for consumption as a component part of a complete liquid food.

It was submitted that the powdered product has many of the ingredients that are contained in Metrecal liquid and Carnation Slender, two products that are currently marketed as food products.

Labels of each product has been provided and made a part of the taxpayer's file. With two exceptions the labels recite that the powdered products are a "supplemental Source of Protein High Protein Food", and set forth the percentage of protein and other pertinent information. The exceptions relate to Ease sold in an unsweetened form and Gloda Hi-Protein which contain the phrase "Dietary Protein Supplement High Protein Food". The product Super-Ease was merely an improved version of Ease.

The taxpayer provided a chart showing the breakdown of sales of each of the products.

Extensive documentary evidence was also offered relative to the function of protein as a major food nutrient and of its importance in the diet of human beings (see transcript of hearing, pages 9 to 17).

The representative of the taxpayer argued that the Pro-Snax product is a complete protein food which, per its label, "may be eaten like candy as a between meal snack, as a meal substitute, or before meals to reduce appetite and aid in weight reduction".

Alternatively, it was argued that the taxes determined for sales of each protested item should be abated on the basis that the board staff has previously approved an exemption for the product. This claim is based on the information recited in the declaration of [F] previously referred to.

Finally, it was submitted that the provisions of Regulation 1602, which specifically provide that protein powders are taxable should not be applied prior to October 27, 1973, in any event, because the prior regulation did not contain a specific ruling on this type of product.

Analysis and Conclusions

Revenue and Taxation Code Section 6359 excludes from the definition of food products "medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts".

This provision of the statute was in effect in its present form during the entire period covered by this deficiency determination. It is implemented and interpreted by the provisions of Sales and Use Taxes Regulation 1602, which was renumbered and adopted by the board as the successor to Sales and Use Taxes Ruling 52 on November 3, 1971. The new regulation and its predecessor, ruling 52, each contained the following language until October 27, 1973, when the regulation was amended to specifically provide that protein powders were subject to the tax.

"Food products do not include...preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts."

In addition Sales Taxes General Bulletin 62-6, promulgated as a public release, functioned as a further interpretation of the law until October 27, 1973. A true photocopy of the bulletin marked as Exhibit B is attached hereto and incorporated herein by reference.

An interpretative letter issued by the office of Board Member Richard Nevins, dated December 9, 1970, is also attached and incorporated herein as Exhibit C.

Other Information:

On January 3, 1961, the board staff issued annotated letter ruling No. 245.1440 expressing the view that the sales tax was applicable to "Neo-Life Food Supplement with Protein", and "Neo-Life Formula 100 Protein".

Absent the various complementary provisions that were in effect during the audit period, it is nevertheless apparent from the language of the statute that the Legislature sought to exclude from the definition of food products those specially prepared items, which, even though readily consumable by human beings, were sold as dietary supplements or adjuncts.

The term "dietary" when considered in the context of food products is commonly understood to refer to "an allowance of food or quantity of food expressed in terms of a common standard for the particular social or economic group". "Adjunct" is defined to mean "something joined or added to another thing, but not essentially a part of it". (Webster's Seventh New Collegiate Dictionary.)

Thus, it is apparent that the terms "dietary supplement" or "adjunct" are not limited to items that are sold for purposes other than nutrition, but include any items in liquid, powdered, granular, tablet, capsule, lozenge, and pill form which are sold as supplements to the commonly understood food diet.

Applying this standard to the protein powders, we readily conclude that each powder item was marketed as a dietary supplement or adjunct for the purpose of supplementing the human diet with a special protein preparation. Each of the products is labeled to contain at least 75 percent or more protein and is either advertised as a "dietary protein supplement" or a "supplemental source of protein". We draw no distinction on the basis of this minor change in the phrase used to describe the product. What is important is that the products are sold as dietary supplements or adjuncts. It is not necessary that the particular product furnish a certain amount of persons' daily minimum requirement to qualify as a dietary supplement.

Nor can we conclude that the provisions of the tentative regulations adopted by the Federal Food and Drug Administration control the classification of this special exclusion created by the California Legislature. This federal regulatory agency's rules and regulations were enacted for a purpose that is far afield from state taxation and any classification made there is clearly not controlling for state tax purposes.

While it would appear that the current regulation as amended on October 27, 1973, is indeed more precise and spells out the application of the tax to protein powders, we cannot, on the basis of the current information, find that there was an intent to exclude these protested items from taxation for prior periods. Indeed, all rulings, publication, written interpretations, etc., uniformly indicate that such products were subject to the tax.

Metrecal and Carnation Slender are readily distinguishable from the protein powder on the basis of the standard set forth in Sales Taxes General Bulletin 62-8, as well as the fact that the products are advertised and offered for sale as complete meals, and not a specially prepared dietary supplement or adjunct.

An item sold for mixing with a food product does not, by reason thereof, change its character so as to qualify as an exempt food product.

In summary, it is our conclusion that the protein powders are within the exclusion provided by Revenue and Taxation Code section 6359, and therefore do not qualify for exemption as food products under the California Sales and Use Tax Law.

While a closer question is presented with respect to the Pro-Snax item, we also conclude that this item was properly classified as a dietary supplement or adjunct. It is sold in tablet form and advertised as a protein snack (Pro-Snax). A review of its label indicated that the product is 54 protein by weight.

Finally we do not find a basis for relief from the tax in the information provided in the declaration of [F]. The declaration does not provide the staff with the names of Board officials contacted, or the dates and locations of the contacts. Additionally, there was on file written rulings issued to this very taxpayer indicating a contrary classification. In any event, an erroneous interpretation of law by an administrative official does not provide any legal basis for remission of taxes (see Market Street Railway Co. v. State Board of Equalization, 137 Cal. App.2d 87).

Recommendation

It is recommended that the taxes be redetermined without adjustment.

W. E. Burkett, Hearing Officer

7-25-75