



## STATE BOARD OF EQUALIZATION

916/445-6493

January 17, 1984

Ms. [L]  
 Tax Department  
 [X]  
 XXXX --- ---  
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S- -- XX XXXXXX

Dear Ms. [L]:

Your letter of October 25, 1983 has been referred to me for reply. You request our opinion as to the correct application of tax to the sale of "Avacare Complete." We regret that our response has been unavoidably delayed.

Avacare Complete is a powdered mixture derived "from natural sources." Listed on the label for this product are the Nutritional Information per serving, the Percentage of U. S. Recommended Daily Allowances, (U.S. RDA), and the Ingredients. The principal ingredients are milk derived proteins (casein and whey) and fructose sugar. The Avacare powder is a "delicious meal replacement prepared from natural sources and ingredients formulated to provide complete and balanced daily nutrition with low calories when used as described in the booklet, the 'Avacare Complete Plan' for weight control." The label cautions the user not to use Avacare Complete as their sole food source. Instead, the user is directed to use the product as part of the Avacare Complete Plan. Apparently, the Avacare Complete Plan for weight control was developed by a physician based on over 25 years of research in nutrition and body metabolism. Each "meal" of this product supplies the user with 110 calories and 13 grams of protein.

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 taxation. 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 sugar, milk, milk products, and milk type beverages. Although a product for human consumption such as a milk based beverage may fall within a category that 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, powdered, granular, tablet, capsule, lozenge, or pill form, and (2) 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..."

Regulation 1602 also provides that tax does not apply to "...any such products which...are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and food providing adequate caloric intake. An example of the latter is a food daily providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the regulations of the Federal Food and Drug Administration..."

We are of the opinion that Avacare Complete does not qualify as a "food product," as that term is used in Regulation 1602, because it is sold as a dietary supplement. Avacare is a product in powdered or granular form that is described on its label as a diet food which is designed to decrease the user's caloric intake and encourage weight loss. Furthermore, this product does not provide the user with a sufficient amount of proteins and calories in the recommended daily dosage to qualify as a complete dietary food under this regulation. Therefore, tax applies to the sale or use of this product.

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

Very truly yours,

Charles J. Graziano  
Tax Counsel