

**STATE BOARD OF EQUALIZATION**

916-445-6493

March 17, 1983

[X]

Dear [X]:

Your letter of December 13, 1982 has been referred to the undersigned for reply. You have requested that we reconsider our opinion that the "Cambridge Diet" does not qualify as an exempt food product under Section 6359 of the Revenue and Taxation Code and Sales and Use Tax Regulation 1602. It is your contention that the Cambridge Diet is a product "comparable" to another food product, namely, "Slender" which is made by [Z] Carnation. You have also submitted to us the product labels from Slender and the Cambridge Diet for a comparative analysis of the ingredients contained therein. Since we have previously determined that Slender is a tax exempt food product, you feel that we should likewise classify the Cambridge Diet as a tax exempt food product. Additionally, in your letter, you claim that the Cambridge Diet is a tax exempt food product since it is a "complete dietary food," as that term is used under Regulation 1602(5). In support of your claim, you have submitted to us certain scientific information contained in two U.S. Patents (your reference Exhibit C and Exhibit D) which were issued to [X], the developer of the Cambridge diet.

In regard to your first point that the Cambridge Diet and Slender are "comparable" food products, the evidence that you submitted to us does not support your argument that these products are "comparable." As Dr. [H] stated in Exhibit C (U.S. Patent No. 4,237,118):

"There is currently no commercially available formulation which contains the minerals and vitamins, far less the other necessary chemicals including essential fatty acid(s), in a form suitable for use as a supplement to skimmed milk in my diet..."

[X] further declared in Exhibit D (U.S. Patent No. 4,298,601) that:

“Another known, commercially available food preparation sold as an all-in-one breakfast substitute (Slender) contains the minerals and essential amino acids in the proportion required by man as well as carbohydrates and most of the necessary vitamins. Only the dry mixture however has any similarity to the dietary formulation of this invention, and even then its carbohydrate content is so high as to give rise to clinical edema supposing it were used as a sole foodstuff-while when used in accordance with the directions, admixed with the suggested amounts of milk, its calorie value would be far too high for use in the dietary methods and formulations of the present invention.” (Emphasis and clarification added).

Since the sales of Slender are not taxed, you contend that the sales of the Cambridge Diet should likewise be exempt from tax. In his patent applications (Exhibits C and D), [X] persuasively argued that Slender and the Cambridge Diet are dissimilar products. [X] concluded that Slender is a food preparation which is sold as an all-in-one breakfast substitute and is not suitable for medicinal use as a dietary supplement, whereas the Cambridge Diet is suitable for such medicinal use. Therefore, because of their distinguishable characteristics and intended usage, we conclude that the Cambridge Diet and Slender are not “comparable” products. This distinction provides a reasonable basis for the differential tax treatment of these two products.

Classification of the Cambridge Diet as a “food product” could provide it with a tax exempt status under Sales and Use Tax Regulation 1602 (5). It is your position that the Cambridge Diet is an exempt food product because it is a “complete dietary food” and therefore, meets the requirements of subparagraph two of Sales and Use Tax Regulation 1602 (5).

Sales and Use Tax Regulation 1602 (5) provides, in 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...”

Subparagraph two of Regulation 1602 (5), to which you refer, 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 foods providing adequate caloric intake. (Emphasis added).

Clearly, the Cambridge Diet is a product in powdered form which is described on its label as a dietary and food supplement and is designed to decrease calorie intake and increase vitamins, proteins and minerals.

According to the label you enclosed for our examination, the Cambridge Diet is described as “a delicious, nutritious, metabolically balanced diet food, containing 100% of the U.S. RDA of vitamins and minerals that can be used as a meal replacement by dieters who wish to lose weight or as the foundation of a nutritious eating program by those who wish to maintain their constant weight – all by following the Cambridge Plan.” Furthermore, the label states that “If you like being trim you’ll love the Cambridge Diet...a meal replacement for the Cambridge Weight-loss program...a nutritious supplement for the Cambridge Lifetime nutrition program.” (Emphasis added). The user is advised to consult with his doctor before starting the Cambridge diet. Also, the label states that the “Cambridge Diet formula is designed for use as a solid source of nutrition for a period of not to exceed four consecutive weeks at any one time.” The recommended diet consisting of three Cambridge Diet meals per day provides the user with a daily total of 330 calories.

An insight into the product’s intended and prescribed use is furnished by the statements of Dr. [H], as contained in his patent application for the Cambridge Diet invention. In Exhibit C, Dr. [H] states:

“This invention concerns a dietary supplement and dietary methods employing said supplement for the treatment of obesity...” (Emphasis added).

Exhibit C further states:

“I have however now been able to devise a supplement which meets practical requirements, in that it can be used with confidence by the clinician and without undue stress or difficulty by the patient, even unsupervised at home, in conjunction with convenient amounts of skimmed milk (either liquid or powdered) to provide a safe, low-calorie diet...over the worthwhile diet range of calorie intake of from about 200 calories to about 600 calories per day. According to this invention there is provided a dietary supplement, containing mineral and vitamins, for use in conjunction with skimmed milk to provide a complete low-calorie diet for the treatment of obesity in man...” (Emphasis added).

According to [X], the Cambridge Diet is formulated as a dietary supplement for the treatment of obesity in humans by providing the patient with a low calorie diet, while concomitantly increasing the patient’s intake of minerals, proteins and vitamins. It is apparent, therefore, that the Cambridge Diet is formulated for medicinal purposes (i.e., the treatment and cure of obesity in man) and is sold on the basis of its medicinal qualities. As such, the Cambridge Diet is more closely identified with medicines than with foods. These facts, as well as the information contained on the product’s label, place the Cambridge Diet squarely within

the confines of Regulation 1602(b) (A) and (B). Therefore, we are of the opinion that the Cambridge Diet does not qualify as a "food product" as that term is used in Regulation 1602.

You have placed considerable reliance on the provisions contained in subparagraph two of Regulation 1602 (5) as providing your product a tax-exempt status. Your contention is that since the Cambridge Diet is a "complete dietary food," as that term is used under this subparagraph, we must classify the Cambridge Diet as a "food product," the sales of which are exempt from tax. Your reliance on this particular section is inappropriate, since you overlook the fact that the Cambridge diet is properly classified as a dietary supplement, and as such, it is not an exempt "food product" as provided under Regulation 1602 (5)(A) and (B). The inquiry into the question of whether or not a particular food preparation is a "complete food product" is only relevant in those situations where the preparation is not excluded from definition of a "food product" under section (5)(A) or (5)(B) of Regulation 1602. Accordingly, we remain of the opinion that the Cambridge Diet is not a tax exempt "food product" as that term is used under Regulation 1602.

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

Very truly yours,

Charles J. Graziano
Tax Counsel

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