

M e m o r a n d u m**245.1129**

To: Mr. Gerald J. Jung
CH District Compliance

Date: November 16, 1994

From: John L. Waid
Tax Counsel

Subject: [X]

I am responding to your memorandum to the Legal Division dated October 4, 1994 regarding the taxpayer's sales of Peak 2008, Nature's 2000, and Biogen 2001. You attached to your memorandum product labels and a brochure entitled "THE BIO.GENIC PROGRAM for your GOOD HEALTH."

These products are in capsule form. The labels do not make any claims about the products, but the directions say to take "one half-hour before meals." The brochure describes them generally as "excellent nutritional supplements for general use with some special features." It also describes Biogen 2001 as "particularly recommended as an immune system stimulant for resistance to most diseases and as an anti-inflammatory." It says Peak 2008 is "a tonic to stimulate metabolic rhythm" which "may provide relief from mental fatigue and stress and supply needed energy for activities that are both physically and mentally demanding." It says Nature's 2000 is "a good general tonic for children and adults which "may be helpful for allergenic problems such as those associated with hay fever and eczema" and which "may also be helpful for the relief of symptoms of inflammation associated with various infections and in alleviation of rheumatoid, arthritis and back pain where inflammation and swelling are present." It also contains this disclaimer:

"It must be stressed that [X] makes no claims for the therapeutic value of these products. They are simply nutritional products that are intended to be supplementary to a healthful diet, regular exercise and period medical check-ups."

OPINION

Section 6359, as interpreted and implemented by Regulation 1602, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Regulation 1602(a) (4) excludes medicines from the definition of food products. Sub-division (a) (5) excludes certain other items from the definition of "food products" as follows:

“(5) ‘Food products’ do 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 interpreting and implementing the broad provisions of section 6359(c), Regulation 1602(a) (5) thus 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 occur: (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.

The directions say to take before meals. These items are clearly labelled, then, as food adjuncts. Despite the disclaimer, the brochure also makes specific medicinal claims for the products. We thus conclude that they are, per the above authority, medicines or food adjuncts or supplements the sales of which are subject to tax.

JLW:te