

**STATE BOARD OF EQUALIZATION**

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March 11, 1991

[L]

[M]

XXXX XX<sup>th</sup> ---, Suite XX

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RE: S- -- XX-XXXXXX

Dear [L]:

Assistant Chief Counsel Gary J. Jugum has referred your letter to him of February 13, 1991, to me for a response. You have asked about the applicability of the California Sales and Use Tax Law to sales of three products which your company (hereinafter "[M]") sells. Your letter discusses each of the products, and you have attached copies of what I assume to be can or package labels describing the uses of the products and also giving nutritional information.

I. OPINION

A. Sales and Use Tax Generally

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 (290 P.2d 201.) "The taxpayer has the burden of showing that he clearly comes within the exemption." Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption

Revenue and Taxation Code Section 6359, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for the sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain a list of products which, either singly or in combination, are

considered “food products”. Regulation 1602(a)(5), however, excludes certain 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”

Regulation 1602(a)(5), subsequently, however, restricts the limitation on the definition of “food products” as follows:

“Tax, however, does not apply to any such products which either are exempted by Section 6369, respecting prescription medicines, or 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. An example of the latter is a food daily requirement providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the Federal Food and Drug Administration of the following vitamins: A, B1, C, D, Riboflavin, and Niacin or Niacinamide; the following minerals: Calcium, Phosphorus, Iron and Iodine.”

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) 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 occurs: (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 subsequent references to “such products” in that subsection refer to products which occur in one of the enumerated forms, not products for which the claims prescribed in subsections (A) and (B) are made.

C. Tax Consequences to [M]

Based on the above standard, we conclude as follows:

1. Pathway Fiber Bar. You state that this product is a fiber bar sold as a meal replacement. We have previously concluded that food bars are not one of the seven forms to which the strictures of Regulation 1602(a)(5) apply. We have compared them to candy, which is one of the products defined as "food products" by Regulation 1602(a)(1). Therefore, sales of the Pathway Fiber Bar are exempt from tax.

2. Pathway Meal Replacement Shake. Your letter states that this is a powdered product which is mixed with cold water in order to be consumed. The copy of the label you enclosed describes the function of this product as follows: "The Pathway Shake is nutritionally balanced and high in fiber to help you feel great as you give special attention to your weight management program." Therefore, the label designates the Pathway Meal Shake as a dietary supplement for the purpose of weight management. It is thus excluded from the definition of a "food product" by Regulation 1602(a)(5), and its sales are subject to tax.

3. Fibersonic. You describe this product as a powder to be blended with milk to give a liquid similar to a mil-shake texture. The copy of the label you enclosed states that it is a dietary supplement. Therefore, it is excluded from the definition of a "food product" by Regulation 1602(a)(5) with the result that its sales are subject to tax.

For your information, I have enclosed a copy of Regulation 1602. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Tax Counsel

JLW:es

Enclosure: Reg. 1602