

**STATE BOARD OF EQUALIZATION**

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August 30, 1989

Mr. [M]
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Dear Mr. [M]:

This is in response to your letter of July 10, 1989 regarding the correct application of tax to Meritene – a powdered protein supplement.

As we discussed in our telephone conversation, Meritene is not considered an exempt “food product” under Sales and Use Tax Regulation 1602, “Food Products.” Paragraph (a)(5) of Regulation 1602 provides that:

‘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 determining whether a product falls within category (B), it is important whether the manufacturer has specially mixed or compounded ingredients for the purpose of providing a high nutritional source. For example, protein supplements and vitamin pills are taxable as food supplements.

* * *

“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 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.”

Meritene clearly falls within the category of a taxable protein powder and does not contain sufficient calories or protein to be considered a complete food. As such, there is no legal basis under which we could reclassify this product as an exempt “food product.”

If you have further questions concerning this matter, please write this office again.

Sincerely,

Mary C. Armstrong
Senior Tax Counsel

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