

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

December 31, 1991

Ms. [A]
Manager, [C]
XXXXX --- ---, Suite XXX
--- ---, California XXXXX

RE: S- -- XX-XXXXXX

Dear Ms. [A]:

Ms. Jean McNeill of the Return Review Section has asked the Legal Division to respond to your letter to her of October 19, 1991, which response has been delegated to me. You wrote in response to her letter of October 19, 1991, requesting additional information regarding your line 5 deductions on your Sales and Use Tax Return for March 1991. You indicate that you sell vitamins and food supplements. You enclosed several sample labels and one sample bottle of product.

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.Ap.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.Rprt. 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”

Food products also do not include products for which medicinal qualities are claimed. (Reg. 1602(a)(4).) Unlike as with food supplements, the medicinal claims need not appear on the product label. The marketing claim on the packaging is the determining factor as to whether or not sales tax is due. Sales of a medicine are exempt from tax if they are sold or furnished in the manner required by Regulation 1591(a).

C. Tax Consequences to [C]

Unfortunately, the materials which you sent are very confusing. You sent several xeroxes that look like copies of product labels. Each xerox has an "X" through it in green ink, and some carry the additional notation that the product claim on the xerox do not appear on the label. The problem is especially acute with the only product for which an actual container is included – the Aller-Comp No. 824 P.S.E. The xeroxed description makes specific medicinal claims for the product, saying it may provide temporary relief from arthritis, simple allergies, inflammation, and minor aches and pains. However, the description of the product on the jar label makes no such claims. For the purpose of this letter, then, we assume that the xeroxes are copies of items included in the packaging materials.

You supplied xeroxed materials for each of the following products: Aller-Comp No 824 P.S.E.; Herbal Flavonoids No. 829; DGL NO. 840; Kan-Kleer No. 809; Fem-Care No. 819; Arbutin Complex No. 802A; Silymarin Complex No. 801A; Silymarin-7x No. 801; Adren-Ade No. 827; Powdered Extract Ginko Bilboa, Folia (8:1); and Escalation No. 821. These materials make specific medicinal claims for each one of the products involved. A typical example is the

claims noted above made for the Aller-Comp No. 824 P.S.E. You are apparently not a doctor nor is your shop a medical facility. Thus, tax applies to sales of these items.

For your information, I have enclosed copies of Regulations 1591 and 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

Encs.: Regs. 1591 & 1602

cc: Ms. Jean McNeill, Return Review