

M e m o r a n d u m**245.1412**

To: Ms. Leila Khabbaz
Sacramento District Office

Date: March 29, 1996

From : Kelly W. Ching
Staff Counsel

Subject: [H]
S- -- XX-XXXXXX

This is in response to your memorandum dated February 6, 1996 regarding whether or not certain items qualify as food products the sales of which are exempt from tax. You state:

“Attached is a letter dated November 14, 1995, from the --- District responding to Mr. [M], CPA’s letter of October 23, 1995 (copy attached). In his letter on behalf of his client, [H], Mr. [M] asks if his client’s products, ‘Ashitaba Percent’ powder and ‘Ashitaba Percent’ tablets qualify as food products the sales and use of which are exempt from tax.

“The district determined that the powder product is taxable because it is sold in powdered form and is described on its package as a food supplement. In addition, the district obtained a promotional brochure and determined that both the powder and tablet products are taxable because they are advertised in the brochure as ‘food and health supplements.’

“In his letter of December 14, 1995 to the Audit Evaluation and Planning Section (copy attached), Mr. [M] indicates that he will advise his client to delete any reference to ‘food supplement’ on the packaging of the powdered ‘Ashitaba Percent’ thus avoiding the exclusion from the term food product that is found in Regulation 1602(a)(5)(A). Mr. [M] also argues that both products do not fall within the exclusion from the term food product found in Regulation 1602(a)(5)(B) because the manufacturer does not add any other ingredient for the purpose of providing a high nutritional source.

“Our review of the packaging, packaging inserts and promotional brochure (attached) supports the findings of the district that both products are excluded from the definition of food under Regulation 1602(a)(4) and 1602(a)(5)(B), and their sales are subject to tax even if the ‘Ashitaba Percent’ package or label does not describe the products as food supplements.”

You ask that we look at the translations of the sales brochures in order to determine whether we agree with your conclusion.

DISCUSSION

As you know, a retailer owes sales tax on its retail sales of tangible personal property in California, measured by gross receipts, unless specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.) Section 6359 provides an exemption from sales and use tax for sales of food products for human consumption under certain circumstances, as explained in Regulation 1602. While subdivisions (a)(1) and (a)(2) of Regulation 1602 contain lists of products that are considered food products for purposes of section 6359, subdivisions (a)(4) and (a)(5) explain that certain other products are excluded from the definition of food products:

“(4) ‘Food Products’ do not include medicines, cough drops, mineral oils, cigarettes, cigars, tobacco, coloring extract, ice, and dog, cat, bird and other animal foods....

“(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 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.

“Other items, such as cod liver oil, halibut liver oil, and wheat germ oil, are considered dietary supplements and thus subject to tax even though not specially compounded....”

You indicate that page 1 of the manufacturer’s sales brochure includes descriptions of the products as “vegetable supplements” that are “approved by the medical and pharmaceutical field in clinical laboratories to have exceptional nutritional value contained in the element Chalcone which is essential to good health.” You state that the brochure also contains the following

claims: that research shows Ashitaba “helps strengthen the immune system, lowers cholesterol, balances the pH level, and aids in preventing ulcers and many other ailments”; that “chalcone, which is found in the plant of Ashitaba, actually prevents and slows down the growth of cancer cells”; and that “Japan’s Annual Medical Conference published the essay focusing on the benefits of Ashitaba especially for AIDS patients.”

You explain that pages 2 through 6 of the brochure list testimonials from consumers describing the Ashitaba products as a cure for drunkenness, jaundice, indigestion, hypertension, high cholesterol, liver problems, water retention, hardened arteries, diabetes, bad skin, stomach problems, headaches, gallstones, constipation, impotence, cramps, lost sleep, neck and shoulder pain, insomnia, allergies, high blood pressure, and bad breath. You state that page 7 of the promotional brochure contains these statements: “there is a lot of Natural Vitamin B12 contained in the element of the Hachi Jo Island Ashitaba,” “Vitamin B12-activate brain cells, increase concentration,” “suppressing your body of Vitamin B12 will increase the tendency of instability, depression, insufficiency of memory, there decreasing motivation.”

In his December 14, 1995 letter, Mr. [M] admits that the packaging for the powdered “Ashitaba Percent” contains a statement that the product is a food supplement. Mr. [M] indicates that he will advise his client to delete references to the product as a food supplement from the packaging of the powdered “Ashitaba percent.”

Mr. [M] then contests the district’s finding that where the literature, and not the “product packaging” itself, for the tablet and powdered “Ashitaba Percent” describes both products as food and health supplements, the products are food supplements.

Mr. [M] further argues that in order for a product to be prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally vitamins, proteins, minerals, or caloric intake, subdivision 1602(a)(5)(B) of Regulation 1602 requires that the manufacturer must have added another ingredient for the purpose of providing a high nutritional source.

We have previously concluded that promotional literature is part of the labeling or packaging of the product that the literature describes. Therefore, even if [H] removes the description of the product as a food supplement from the packaging of the powdered “Ashitaba Percent,” as long as the promotional literature continues to describe the product as a food supplement, food adjunct, dietary supplement, or dietary adjunct, the product will be considered as described on its package or label as a food or dietary supplement or adjunct. Moreover, we have previously determined that even if a product labeling or packaging does not use the actual words “food supplement,” “dietary supplement,” “food adjunct,” or “dietary adjunct,” the product will be considered a food or dietary supplement or adjunct if words relating to vitamins, proteins, minerals, or caloric intake are used on the labeling or packaging.

With respect to 1602(a)(5)(B), that subdivision states that in determining whether a product is prescribed or designed for one of the enumerated purposes, it is important whether the manufacturer has specially mixed or compounded ingredients for the purpose of providing a high nutritional source. However, the subdivision also states that some items are considered dietary supplements even though not specially compounded. Therefore, while special mixing or compounding of the ingredients of a product provides strong evidence to support a conclusion that a product comes within Regulation 1602(a)(5)(B), the product can still come within that subdivision even if its ingredients have not been specially mixed or compounded.

The green product brochure attached to your memorandum contains the following statements: "Specially selected tender Ashitaba sprouts are processed in modern plants using the Japanese patented technology (PAT1419841). Manufactured using this patented method, the Ashitaba Granules and Powder not only completely retain their original nutritional elements, but these elements can be rapidly absorbed by the human body."

It appears from these statements that the ingredients in the tablet and powder form of "Ashitaba Percent" are in fact specially compounded. As stated above, even if the ingredients are not specially compounded, the lack of special compounding or mixing does not preclude the products from being considered food or dietary supplements or adjuncts under subdivision (a)(5)(B) of Regulation 1602.

Further, the product literature makes specific medicinal claims for the products. This means that neither item qualifies as a "food product;" thus, sales of both products are subject to tax. (Reg. 1602(a)(4), Business Taxes Law Guide Annotation 245.1248 (9/23/91).)

We agree with your conclusion that, based on the information provided, both "Ashitaba Percent" tablets and "Ashitaba Percent" powder are excluded from the definition of "food products" by subdivisions (a)(4) and (a)(5) of Regulation 1602. If you have further questions, please feel free to write again.

KWC:cl

cc: --- District Administrator

A "medicinal claim" on the product label is no longer used as a basis for differentiating a food product from a medicine. Please see Annotation 245.0724 (11/17/08). RDT. 7/2/09.
