

STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
TELEPHONE (916) 324-3828
FAX (916) 323-3387
www.boe.ca.gov

JOHAN KLEHS
First District, Hayward

DEAN ANDAL
Second District, Stockton

CLAUDE PARRISH
Third District, Torrance

JOHN CHIANG
Fourth District, Los Angeles

KATHLEEN CONNELL
State Controller, Sacramento

September 5, 2002

JAMES E. SPEED
Executive Director

Ms. [A]
[W]
XXX --- ---, #XXXXX
---, -- XXXXX

Re: **S- -- -- XX-XXXXXX**
[W]'s Nutritional Drinks

Dear Ms. [A]:

You have brought up an extremely interesting problem, which has caused the Legal Department to take another look and carefully review the labels of all of these products. Thank you for your patience.

As evidenced by the labels that you attached to your letter, the [W]'s products designate themselves as food supplements. As you suggested that the Ensure Products were identical to the [W]'s products, we have taken a closer look at the Ensure labels you also attached.

The label for Ensure calls it: "Complete, Balanced Nutrition to help stay healthy, active and energetic." It also says it is "#1 Doctor Recommended*." The asterisked phrase is somewhat hidden in the copy, but says "Among regulation nutritional supplements." The label also specifies that Ensure helps the purchaser meet specific nutritional requirements for protein, carbohydrates, zinc, Vitamin C, and other vitamins and minerals. The instructions on the back of the label say "Suggest three cans a day for supplemental use." They also say that a doctor must be consulted if the purchaser intends to use Ensure as the sole source of nutrition. The label for Ensure Plus is substantially identical to that of basic Ensure. The asterisked phrase is slightly different: "Among high-calorie nutritional supplements." The instructions are the same.

As we previously discussed, Regulation 1602(b)(5), in the case of nutritional supplements, places its focus on the contents of the product's label. Thus, if the label changes, the tax consequences may change. We have previously determined that if the label says to "take with meals," the product is a food supplement. (See, e.g., Annot. 245.1129 (11/16/94).)

As you know, Annotation 245.1420 (10/31/84) classifies Ensure and Ensure Plus as a foods product the sales of which are not subject to tax. In reviewing the back-up documentation, apparently at the time the memoranda were written, the references described above were not contained on the products' labels. We also note parenthetically that Ensure's advertising on television now specifically calls it a nutritional supplement.

Because the labeling of these products has changed, the tax consequences of the sale have also changed. Ensure and Ensure Plus now clearly label themselves as nutritional supplements. As a result, they can no longer be considered, under Regulation 1602(b)(5), as food products. Sales of these products are thus subject to tax.

We are by copy of this letter alerting the Sales and use Tax Department to this change. The Department will notify other retailers.

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
Senior Tax Counsel

JLW:ljt

cc: Mr. Ramon J. Hirsig (MIC:43)
Ms. Frieda Orendt-Evans (MIC:47)
Ms. Charlotte Paliani (MIC:92)
Mr. Timothy W. Boyer (MIC:83)
Mms. Janice L. Thurston (MIC:82)
Out-of-State District Administrator (OH)