

**STATE BOARD OF EQUALIZATION**

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November 18, 1992

BURTON W. OLIVER
Executive Director

Ms. M--- H---
L---, Inc.
XXX --- --- Road West
---, California XXXXX

Re: [No Permit Number]
B--- Protein Supplement
(Weight Loss Product)

Dear Ms. H---:

Mrs. Suzanne S. MacInnis of our Concord District Office has referred your letter to her of October 5, 1992, to the Legal Division for a response. You asked if sales and use tax applies to your sales of Nutri-15 Plus, made by B---, Inc.

You enclosed with your letter a portion of the box which contained the product. The particular item which it had held was called "Naturally Flavored Lemon Drink Mix," apparently a powder to be mixed presumably with water to be consumed. It is labelled a "protein supplement," and there are also directions for using it in a weight-loss program. It supplies 60 calories per serving, 15 grams of protein, and 20% of the U.S. RDA of protein. It contains less than 2% of certain other vitamins and minerals.

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 PO.2d 201.] The taxpayer has the burden of showing that he clearly comes within the exemption. Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption.

Section 6369, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered "food products." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) Sub-division (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 subsequently restricts this 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 regulations of 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) thus 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.

C. Tax Consequences to L---, Inc.

The product at issue is in powdered form and so comes within the strictures of Regulation 1602(a)(5). It is labelled as a protein supplement and may also be used for weight loss. It is thus excluded from the definition of "food products" by the above authority. As a result, sales of this product are subject to tax.

Every person selling products of a kind the gross receipts of which must be included in the measure of tax must obtain a seller's permit. (§§ 6014, 6066.) Please contact the Concord District Office to obtain your permit.

For your information, I have included 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