

**STATE BOARD OF EQUALIZATION**

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March 16, 1992

Mr. R--- C---
Controller
W--- H--- Healthcare System
W--- T--- H--- District
XXXX --- Avenue
---, California XXXXX-XXXX

RE: SR -- XX-XXXXXX
Optifast Program

Dear Mr. C---:

I am responding to your letter to the Legal Division dated February 6, 1992. You have requested a judgment concerning the tax status of the products sold under the above program. We note that the Board Staff does not make judgments. It also may not issue tax rulings; only the Board itself may do that. We can, however, give you our opinion regarding the correct application of tax to a given set of facts.

You attached to your letter a statement from Dr. A--- K. S---, Medical Director of (presumably) the Optifast Program, as to its operation, and nutritional information on the Optifast 70 and 800 products. Dr. S--- states as follows:

“The W--- H--- Weight Management Program currently utilizes Optifast 70 and Optifast 800 food replacement formula which is manufactured by S--- N---.

“Patients participating in this program are medically supervised by a physician during their weight loss phase and consume Optifast formula exclusively.

“This product is available by prescription only and is not available to the general public. It is not used as a nutritional supplement but for total meal replacement.”

I. OPINIONA. 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 state, all statutory references are to the Revenue and Taxation Code.)

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, 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(a)(5), subsequently, however, restricts the 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.”

C. Prescription Medicines

Section 6369 interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591 provides that sales of medicines, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. (Reg. 1591(a).) Subdivision (b)(1) of Regulation 1591 defines “medicines” to “mean and include any substances or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for such use.”

D. Tax Consequences to Washington Hospital Healthcare

Our previous research has revealed that “Optifast” supplies all of the vitamins and minerals for which an RDA has been established as well as many trace elements for which RDA’s have not yet been defined. Unfortunately, the product does not supply the daily caloric count set forth in the regulation. When used as the sole source of nutrition, Optifast 70 supplies 420 calories and Optifast 800 supplies 800. Therefore, these products do not qualify as “complete dietary foods” under Regulation 1602(a)(5).

However, we note that Dr. S---’s letter states that these products are available only by prescription and cannot be sold over the counter. We have previously determined that obesity is a disease and substances or preparations intended for internal application to the human body to treat obesity qualify as medicines under Regulation 1591(b)(1). Accordingly, we have thus concluded that sales of Optifast 70 and Optifast 800, because a physician must furnish them to his patients pursuant to a medically-supervised program for the treatment of obesity, are not subject to tax pursuant to Regulation 1591(a)(2).

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

Mr. R--- C---

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March 16, 1992
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Enclosure: Regulations 1591 & 1602