

M e m o r a n d u m**245.1205**

To: Ms. Jean McNeil

Date: November 26, 1990

From: John L. Waid
Tax CounselSubject: K--- and V--- B---
SR -- XX-XXXXXX

Your memo of October 9, 1990, to the Legal Unit has been referred to me for a response. You have requested advice as to whether the taxpayers' products are subject of sales tax.

The taxpayers appear to be [X] distributors. In response to your previous request for further information, they sent portions of product descriptions from boxes of [X] Meal Shakes, Instant Protein Drink Mix, and Slim Plan Drink Mix, and a whole Energy Bar wrapper. The Instant Protein Drink label states as follows:

Notice: Use this product as a food supplement only. Do not use for weight reduction. [X] recommends the clinically tested Slim Plan products for weight loss or mainenance."

The packet also included a message, apparently from [X] headquarters, quoting a portion of a letter from Staff Counsel Mary C. Armstrong dated August 9, 1982, concluding as follows:

"[X] Instant Protein Drink Mix qualifies as a 'food product' as that term is used in Sales and Use Tax Regulation 1602 because it is not described on its label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and its label does not make any medicinal or weight loss claims. As such, tax does not apply to your sale of this product."

Also note that, pursuant to Section 6015, the Board has previously ruled that [X] is the retailer of tangible personal property sold through salesmen or representatives who have distributors. If these taxpayers are distributors and are adding sales tax to their sales, there is an excess tax reimbursement problem.

Revenue and Taxation Code Section 6359(a), interpreted and implemented by Regulation 1602, provides an exemption from sales and use taxes for the sales of food for human consumption. Regulations 1602(a)(1) & (2) 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."

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 use 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 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."

Based on the above standard, I conclude as follows:

(1) Slim Plan Drink Mix: This is a powdered drink mix. The label is incomplete, but the High Protein Drink Mix label states that the Slim Plan products are to be used for weight loss or maintenance. Thus, tax applies to the sales of this product.

(2) Energy Bar: We have previously considered that food bars are like candy bars which are listed as a "food product" in Regulation 1602(a)(1). Because the Energy Bar is no one of this forms of food products to which the strictures of Regulation 1602(a)(5) apply, its sales are exempt from tax.

(3) [X] Meal Shakes: This is a powdered drink mix for which a complete label was unfortunately not supplied. However, the nutritional information which was given indicates that the Meal Shakes supply, if used as a meal substitute for all three meals, a substantial amount of calories and protein (510 and 31.5 grams, respectively) and almost 100% of the RDA of various vitamins and minerals. These products would be considered as a “food products” if the remainder of the label does identify them as food supplements, etc.

(4) Instant Protein Drink Mix: This powdered drink mix is clearly labeled as a “food supplement only.” The prior opinion partially quoted by the taxpayer unmistakably states that this product’s sales were tax-exempt because it was not labeled a “food supplement”. In view of this change in the facts, we reverse our earlier opinion and conclude that sales of this product are now subject to tax.

JLW:es