

**STATE BOARD OF EQUALIZATION**

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June 17, 1991

Ms. [G]
XXX --- ---
--- ---, California XXXXX

RE: S- -- XX-XXXXXX

Dear Ms. [G]:

Your letter of April 23, 1991, to the Legal Division has been referred to me for a response. You are requesting a written opinion regarding the applicability of sales and use tax to the sales of some of the products you sell.

As I understand it, you began selling Forever Living products last year. At the suggestion of the local field office you wrote and sent a package enclosing various cans, bottles, and packets of the products you sell. You want to know which products qualify as food products for tax purposes.

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. Pv. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal. App. 2d, 87, 96 (290 P. 2d 201.)) “The taxpayer has the burden of showing that he clearly comes within the exemption.” Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal. App. 3d 765, 769 [114 Cal. Rptr. 571].)

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 tax for the sales of food products for human consumption under certain circumstances. Subdivision (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, 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 6368, 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) 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. The subsequent references to “such products” in that subsection refer to products which occur in one of the enumerated forms, not products for which the claims prescribed in subsections (A) and (B) are made.

Based on the above standard, we conclude as follows:

1. Forever Nature-Min Vitamin Tablets. The bottle describes this product as a “High-Potency Multi-Mineral Formula.” The Directions describes it as a dietary supplement. Thus, this is a product in tablet form which the label describes as a dietary supplement. Its sales are subject to tax.

2. Forever Arctic-Sea Fish Oil Capsules. The label states that this product provides a rich source of Omega-3 fatty acids and oleic acid and that “[s]upplementation with Arctic-Sea capsules is an excellent way to increase your polyunsaturated fat intake.” Because this is a capsule product labeled as a food supplement, its sales are subject to tax.

3. Aloe Blossom Herbal Tea. The label does not make any claims for this product of weight-loss or specific medical benefits. We have previously determined that herbal teas for which no such claims are made are food products. (II Bus. Tax. L. Guide, Annot. 245.1091. Annotations are excerpts from previous Board Staff opinion letters and serve as a guide to Staff positions.) Therefore, sales of this product are exempt from tax.

4. Cin Chia Tablets. This is a product sold in tablet form. The box calls it “An herbal adaptogen” and indicates that it is based on the golden chia and ginseng herbs. I am unable to determine what is an “adaptogen”. If it is a term of art used in herbal medicines, then this product is a medicine excluded from the term “food products” by Regulation 1602(a)(4). If not, since the label makes no nutritional claims of any kind for this product, we conclude that it is a food product the sales of which are exempt from tax.

5. Forever Bee Pollen, Forever Royal Jelly, and Forever Bee Propolis. We have previously concluded that where bee pollen products are sold in tablet form, are, if sold as food supplements or weight-loss aids, excluded from the term “food products” under the above regulation. The instant products are in tablet form and their labels all carry the same warning: “Consult your physician before taking this or any other nutritional supplement.” Therefore, since these products are tablets labeled as food supplements, they are excluded from the term “food products” with the result that their sales are subject to tax.

6. Forever Absorbent-C. We have previously concluded that vitamin tablets are excluded from the term “food products” by Regulation 1602(a)(5) with the result that their sales are subject to tax.

7. Forever Lite Fast Break Meal Replacement Bar. We have previously concluded that food bars are not one of the forms of food products to which the strictures of Regulation 1602(a)(5) apply. Sales of this product are exempt from tax.

8. Forever Bee Honey. This product appears to be merely honey for which the label makes no medicinal or weight-loss claims. Its sales are thus exempt from tax.

9. Aloe Vera Gel. This product is "100% Stabilized" Aloe Vera Gel. Although the label makes no claims of any kind for it, previous correspondence with Forever Living Products indicates that the product is designed as a food supplement. We have thus previously concluded that Forever Living Aloe Vera Gel is a food supplement excluded from the term "food products" by the above regulation. Its sales are subject to tax.

10. Aloe Berry Nectar. The label states that this product is "100% Stabilized Aloe Vera with Natural Cranberry and Apple Concentrate" and makes no medicinal or weight-loss claims for it. We thus conclude that it is a food product the sales of which are not subject to tax.

11. Forever-Lite Chocolate Chiffon Shake Mix. The label describes this product as a "Nutritional Diet with Aloe and Fiber" and as a meal replacement. However, the shake, if used as the sole source of nutrition, provides a daily intake of only 270 calories and 33 grams of protein, considerably less than the standard for a "complete dietary food" established by Regulation 1602(a)(5). We thus conclude that this product is a dietary supplement the sales of which are subject to tax.

One reservation must be made. We have concluded that several of the products listed above are food products based on the fact that their labels do not claim that those products are sold as food or dietary supplements or adjuncts or for medicinal purposes. If the promotional literature accompanying any of these products does make such claims, however, those products for which such claims are made are excluded from the term "food products" under the above regulation with the result that their sales are rendered subject to tax.

For your information I have enclosed 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: Regulation 1602