

**Memorandum****245.1328**

To : Mr. Jack Warner  
OH - District Principal Auditor

Date: February 3, 1994

From : John L. Waid  
Tax Counsel

Subject: S- -- XX-XXXXXX  
"Food Supplement" v. "High Source of Nutrition"

I am responding to your memoranda to the Legal Division dated December 17, 1993, and January 18, 1994. In the former, you sent copies of packages or labels for eight food products sold by this taxpayer. In the latter, you enclosed a catalogue which described the products at issue. You request our opinion as to whether the sales of these products are subject to tax under Regulation 1602(a)(5).

**OPINION**

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:

"In determining whether a product falls within category (B), it is important whether the manufacturer has specially mixed or compounded ingredients for the purpose of providing a high nutritional source."

Bearing this standard in mind, we examine the items in question, all powders to be mixed with either water or milk:

1. Omnifit Meal Replacement Drink Mix. The labels for the two versions of this mix contain the following legend: "It is a hearty food with only 150 calories and added convenience when you are watching your diet, but don't have time to prepare a meal." The catalogue describes the products, in part, as follows: "Omnifit meals are calorie controlled to provide only 150 calories per serving when mixed with 8 oz. of water - 250 calories when blended with 8 oz.

of low fat milk.” It thus appears that this product is designed to control caloric intake and its sales are subject to tax under Regulation 1602(a)(5).

2. Fiber'n Mor. The label makes no claims, but the catalogue states that it “adds only 20 calories to your daily caloric intake.” It thus appears that this product is designed to control caloric intake. Its sales are taxable under Regulation 1602(a)(5).

3. Aloe Beta Lemon Drink. Neither the label nor the catalogue makes any special claims for this product. It is thus a food product under Regulation 1602(a)(2) the sales of which are exempt from tax.

4. Wow, Focus, Be Your Best!, and Go for It!. WOW and Go For It! both contain 600 mg. of phenylalanine, an amino acid, and the packages refer to both products as phenylalanine supplements. The package for Focus refers to it as a choline supplement as does the catalogue. The packet for Be Your Best! refers to it as supplying high levels of arginine, an amino acid, and the catalogue calls it an arginine supplement. The first three products are thus dietary supplements, and the fourth appears to have been specially compounded to provide a high source of arginine. Therefore, the sales of these products are taxable.

JLW:es