


STATE BOARD OF EQUALIZATION

LEGAL DIVISION (MIC:82)
 450 N STREET, SACRAMENTO, CALIFORNIA
 (P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
 Telephone: (916) 322-2976
 FAX: (916) 323-3387

JOHAN KLEHS
 First District, Hayward

DEAN ANDAL
 Second District, Stockton

ERNEST J. DRONENBURG, JR.
 Third District, San Diego

BRAD SHERMAN
 Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

July 24, 1995

BURTON W. OLIVER
Executive Director

Ms. [O]

[N]

XXXX --- ---, Suite XXX

--- ---, -- XXXXX

Re: [N]
 No Permit Number

Dear Ms. [O]:

This is in response to your letter dated May 10, 1995 regarding the application of tax to the sale of certain products your company markets.

You have included labels or copies of labels from seven products. It appears that six of the products are sold in capsule form, while the seventh is sold in liquid form. The products in capsule form include "Slim Caps," "Powerjuice Vegetable Juicecaps," "Powerjuice Fruit Juicecaps," "Multi-Enzymes," "Neutral C+," and "OPC Grape Seed Extract." "Essential Minerals" is in liquid form.

DISCUSSION

A retailer owes sales tax on its sales of tangible personal property in California, measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code §6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code §6007.) When sales tax does not apply, such as when sales take place outside of California, the use tax, measured by the sales price of the property sold, applies to the use of property purchased from a retailer for storage, use, or other consumption in California unless such use is specifically exempt from tax by statute. (Rev. & Tax. Code §§6201, 6401, Reg. 1620.) Although the purchaser owes the use tax, a retailer engaged in business in this state is required to collect the use tax from the purchaser and pay it to this state. (Rev. & Tax. Code §§6202, 6203.)

Section 6359 provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances, as explained in Regulation 1602. While subdivisions (a)(1) and (a)(2) of Regulation 1602 contain lists of products that are considered

food products for purposes of section 6359, subdivision (a)(5) explains that certain other products are excluded from the definition of food products:

“(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

“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. For example, protein supplements and vitamin pills are taxable as food supplements.”

In order to determine whether a product is included in or excluded from the definition of “food product,” we first ask whether the product is in one of the enumerated forms—liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then the sales of that product are subject to tax if either of the two following conditions also occurs: (A) the product is described as a food supplement, food adjunct, dietary supplement, or dietary adjunct on its labels or packaging, or (B) the product is prescribed or designed to remedy a specific dietary deficiency or to increase or decrease generally the intake of vitamins, protein, minerals, or calories.

We have previously concluded that the presence of instructions on a product label regarding when to take the product in relation to meals shows that the product is meant as a supplement to meals; therefore, products containing such instructions are considered to be labeled as food supplements or adjuncts. The label for “Slimcaps” contains the following statement: “Recommended dosage: 1 Capsule with 10 oz of pure water 30 minutes before breakfast and 1 capsule with 10 oz of pure water 30 minutes before lunch.” The label for “Powerjuice Vegetable Juicecaps” states that the recommended dosage is “2 capsules with meals or before bed,” and the label for “Powerjuice Fruit Juicecaps” recommends a dosage of “2 capsules in the morning on an empty stomach.” The dosage recommended on the label for “Multi-Enzymes” capsules is “1 capsule before each meal.” Since these products contain instructions regarding the timing of dosages in relation to the timing of meals, they are clearly labeled as food supplements or adjuncts. These food supplements or adjuncts come within the Regulation 1602(a)(5)(A) exclusion from the definition of food products; therefore, sales of these products are subject to tax.

I note that the label for "Slimcaps" capsules, discussed above, describes the product as a weight loss aid. Sales of products providing the user with sufficient calories, protein, vitamins and minerals to qualify as complete dietary foods are nontaxable. (Reg. 1602(a)(5)(B).) However, nothing on the "Slimcaps" label indicates that the product qualifies as a complete dietary food.

The label for "Neutral C+" capsules indicates that it is specially formulated to increase a person's intake of "Ester C," which is identified on the label as a specially patented type of vitamin C. "Essential Minerals," in liquid form, is described on its label as a "powerful mineral formula" increasing "mineral assimilation and absorption." Since the labels indicate that these products are designed to increase generally the intake of vitamins or minerals, they come within the exclusion from the definition of food product explained in Regulation 1602(a)(5)(B); thus, sales of these products are subject to tax.

The label for "OPC Grape Seed Extract" capsules contains this statement: "[N] has enhanced the virtues of OPC [described on the label as an antioxidant] with a custom blend of five very unique herbs...." We have previously concluded that products containing herbs that are sold in capsule form do not qualify as food products within the meaning of the exemption. (Business Taxes Law Guide Annotation 245.1290 (9/27/76).) Further, claims on the label indicate that the ingredients have been specially mixed or compounded to provide a high dose, described on the label as a "saturation dose," of the blended herbs. As a specially mixed blend designed to remedy a deficiency in the herbal ingredients the product contains, "OPC Grape Seed Extract" comes within the Regulation 1602(a)(5)(B) exclusion from the definition of food product, and sales of it are therefore taxable.

You have asked for information regarding the application of tax to shipping charges. Generally, tax does not apply to separately stated charges for transportation of property from the retailer's place of business or other point from which shipment is made directly to the purchaser, provided the transportation is by other than facilities of the retailer. (Reg. 1628.) If a separately stated charge is made designated as "postage and handling," only that portion of the charge which represents actual postage may be excluded from the measure of tax; the portion of the charge that exceeds the actual cost of shipping is subject to tax.

If you have further questions, please feel free to write again.

Sincerely,

Kelly W. Ching
Staff Counsel

KWC:cl

cc: Out-of-State District Administrator