



STATE BOARD OF EQUALIZATION

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January 28, 1998

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E. L. SORENSEN, JR.
Executive Director

Ms. [A]
Tax Department
[W]
Corporate Offices
XXX --- ---
---, -- XXXXX

Re: [W]
Account No. S- -- XX-XXXXXX

Dear Ms. [A]:

This is in response to your letter dated November 5, 1997 regarding the application of tax to a product you sell in your stores.

You state:

“[W] requests a written opinion as to the sales taxability in your state of ‘Efficon’ a physician recommended formula clinically tested to improve male sexual performance. ‘Efficon’ is now available without a prescription.”

With your letter, you enclosed copies of the label for Efficon. The following appears on the labels:

“WHO SHOULD USE EFFICON? EFFICON may be appropriate for use by adult males who would like to improve their sexual performance.

“WHO SHOULD NOT TAKE EFFICON? Men with heart conditions, high blood pressure or those with disease of the renal system should consult a physician before using EFFICON.

“WHAT ARE EFFICON’S EFFECTS? EFFICON has been clinically shown to improve male sexual function . . .

“HOW SHOULD I USE EFFICON AND WHAT IS THE TYPICAL DOSAGE? EFFICON is taken sublingually (under the tongue) for optimal absorption. Draw 1/2 of a dropper, release solution and hold under the tongue for 30-45 seconds, then swallow. Repeat three times a day, and within three weeks you should begin to see significant results.

“HOW DOES EFFICON WORK? EFFICON affects the peripheral autonomic nervous system, increasing parasympathetic (cholinergic) and decreasing (adrenergic) activity. In male sexual performance, erection is linked to cholinergic activity and to alpha-2 adrenergic blockage which has been shown to increase penile blood inflow and decrease penile blood outflow. EFFICON rehabilitates the neural pathways which stimulate sexual desire and performance, EFFICON may also exert a stimulating action on mood, creating an enhanced sense of well-being.

“INGREDIENT Yohimbinum 1x(10% Yohimbe bark in a base of Allium sativum 3x, 20% ethanol/water).

“WARNING If heart palpitations are felt, decrease dose or discontinue use. Do not use with stimulants such as diet pills, decongestants or MAO inhibitors. Not to be used by persons with hypertension, renal disorders or seizures. Keep out of reach of children.”

DISCUSSION

Sales tax generally applies to retail sales of tangible personal property in California. (Rev. & Tax. Code § 6051, Reg. 1620(a)(1).) When sales tax does not apply, such as when a sale takes place outside of California, the use tax, measured by the sales price of the property sold, applies to the use of property purchased at retail for storage, use, or other consumption in California, unless an exemption or exclusion applies. (Rev. & Tax. Code § 6201, Reg. 1620.)

We assume that your inquiry concerns sales your California stores make to California customers; therefore, the sales tax, rather than the use tax, is applicable. A retailer may collect reimbursement for its sales tax liability from its customers if its contracts of sale so provide. (Civ. Code § 1656.1.)

Sales of food products and medicines are exempt from tax under certain circumstances. Yohimbine, the main ingredient listed for Efficon, is defined in Webster's New World Dictionary, Third College Edition, as “a poisonous alkaloid . . . obtained from quebracho bark and the bark of a West African tree . . . formerly used as an aphrodisiac.”

Revenue and Taxation Code section 6359 provides an exemption for sales of food products for human consumption under circumstances explained in Regulation 1602 (copy enclosed). Subdivision (a)(1) and (a)(2) of Regulation 1602 contain lists of products that are generally considered food products for purposes of section 6359. Yohimbine does not appear to

qualify as a food product under Regulation 1602. In any event, even if yohimbine is considered a food product, it appears that Efficon would be excluded from the definition of food product by Subdivision (a)(4) of Regulation 1602.

Regulation 1602(a)(4) explains that an item sold as a medicine does not qualify as a food product. Sales of items sold as medicines are subject to tax unless sold by prescription and unless they otherwise qualify for the prescription medicine exemption set forth in Revenue and Taxation Code section 6369. Regulation 1591 (copy enclosed) explains that a "medicine" is "any substance or preparation intended for use by internal or external 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 that use. (Reg. 1591(b)(1).) In determining whether medicinal claims are made for a particular product, we look at the product label, as well as at any other product literature normally provided to market the product. (Business Taxes Law Guide Annotation 245.0726 (2/25/97).) We were provided with copies of the label, but were not provided with any other marketing materials.

In looking at the product label, we note that specific, detailed instructions are given regarding how much of the liquid product should be taken as each dose (1/2 of a dropper), how the product is to be taken (held under the tongue for 30-45 seconds before swallowing), and how often the product is to be taken (three times per day). A detailed warning is given regarding circumstances under which the user or potential user should decrease the dose, discontinue the dose, or should simply not take the Efficon at all. These statements, along with the facts that Efficon is advertised on the label as a treatment or mitigation for male sexual problems, and that it was apparently available under prescription, indicate that Efficon is being marketed as having medicinal qualities. As such, when Efficon is sold over-the-counter rather than by prescription, its sales are not exempt from tax under section 6369. As the retailer, [W] owes sales tax with respect to its retail sales of Efficon.

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

Sincerely,

Kelly W. Ching
Tax Counsel

KWC:rz

Enclosure: Reg. 1602

cc: Out-of-State District Administrator (OH)

A "medicinal claim" on the product label is no longer used as a basis for differentiating a food product from a medicine. Please see Annotation 245.0724 (11/17/08). RDT. 7/2/09.