

**STATE BOARD OF EQUALIZATION**

(916) 445-3723

September 28, 1982

Mr. [B]
Law Offices of [C]
XXX --- ---
--- ---, CA XXXXX

RE: [A]
Nature's Sunshine Product
No Permit

Dear Mr. [B]:

Your letters of June 30, August 10, and August 12, 1982 to Mr. William Anderson of the Fresno District office have been referred to the legal staff for reply.

Your inquiry concerns the correct application of tax to various herbal and spice capsules sold by your client. Most of the labels of these products state the following:

“Recommendation

One Capsule with three meals each day, or as desired, as an addition to the every day diet.”

You state that [A] placed this recommendation on its labels on the advice of its legal counsel on FDA matters. It is your contention that the recommendation should not dictate the resolution of the issue of whether the products should be considered food products or dietary supplements. Moreover many of the ingredients in the herbal capsules are also included in the contents of the herbal teas (in the conventional tea-bag form) marketed by [A].

Most of the herbs and spices being examined by the Board of Equalization are sold in capsule form. While you concede that vitamins and dietary supplements are frequently sold in capsule form, you do not believe that the fact that a product is encapsulated necessarily means that that product cannot be a food product. The reason [A] decided to put the herbs in capsule form is that that was a very convenient way for the consumer to use the herbs in brewing herbal

tea. The capsule is made out of a gelatin material that dissolves very quickly in hot liquids, and the quantity of herbal products contained in the capsule are generally sufficient to make a cup of tea. When the product is a spice, such as garlic and kelp, the capsule is merely broken and placed in or on the food to be seasoned.

The various products, and a description of each, follows:

- “(1) Kelp. Kelp is designed to be used as salt substitute. It has a definite salty flavor and may be used on salads, meats, or other foods. This product is contained in either a shaker bottle or capsules.
- “(2) Garlic. This product is used primarily for seasoning. The gelatin capsule which contains the garlic is very thin so it dissolves quickly in stews and soups.
- “(3) Ginger. Ginger has a very unique, spicy flavor. It is used as a spice, particularly on fish and other seafoods. Ginger can also be used to brew tea.
- “(4) Alphalfa. (sic) These granules are used to brew alphalfa (sic) tea. This tea has a very nice aroma and fragrance. Moreover, that tea is caffeine-free. [A] also has a similar tea product, but it is contained in tea bags instead of capsules.)
- “(5) Licorice Root. This is used as a sweetening agent. It is a very popular sweetener in China. Apparently some diebetics (sic) use this capsule as a sugar substitute. These capsules can also be used to brew a very sweet tea.
- “(6) Gotu Kola. For centuries, gotu kola has been used to brew a very refreshing vegetable-like drink in the Orient. In Asia, gotu kola leaves are picked, and the juice is squeezed therefrom. The gotu kola capsules contain dehydrated gotu kola leaves which, when placed in water, yield this very popular Asian drink.
- “(7) Comfrey. Comfrey grows wild in many parts of the United States. Comfrey leaves have been used in salads and comfrey root, due to its starchiness, is used in soups. [A]’s comfrey capsule contains comfrey root. These capsules are frequently used for a soup base in place of starch. Comfrey root has a taste that is similar to potatoes. When the encapsulated starch is boiled with water, it gelatinizes into a starchy base.

- “(8) Black Walnut. This product is capable of being used as an herbal tea. It has a nice, dark brown color.
- “(9) Chickweed. This capsule is also capable of being used to brew herbal tea. In some parts of the United States, chickweed leaves are frequently used for making salads.
- “(10) RCC-X. The predominate items in this product (licorice root, red clover tops, and sarsaparilla root) have been blended together in capsule form in order to provide a sweet and fragrant herbal tea. The other contents of RCC-X are added to provide for an astringent background flavor.
- “(11) Combination GRU-X. This substance is used primarily as a spice in cooking. The garlic, rose hips, parsley, rosemary, and watercress are blended together to make a very delectable collage of flavors.
- “(12) RF-X. This product is a take-off of the comfrey mentioned above. It differs from comfrey in that it contains a number of other herbs in addition to comfrey root. This product may be used to make a tea that is similar to comfrey root tea.
- “(13) JP-X. The primary ingredient in this herbal product is golden seal root. That herb has an enticing bitter taste. By placing uva usia leaves in that product, the bitter taste of the golden seal root is somewhat counterbalanced. The result is a very unique tasting beverage.
- “(14) BON-X. The beverage resulting from brewing this product has a very distinct and pleasing flavor. The primary flavor ingredients in this product are white oak bark, comfrey root, and mullein leaves. The essential oils from the white oak bark give this beverage a very potent fragrance and the mullein leaves add a very pleasant flavor to the beverage.
- “(15) SN-X. This product is a synthesis of bitter herbs (golden seal root) and fairly spicy herbs (capsicum fruit). For additional flavor, dessert (Brigham) tea herb is added.
- “(16) P-X. This product bears a strong resemblance to SN-X. However, the tea brewed with PX capsules is a little sweeter than that brewed with SN-X capsules due to the fact that it has cedar berries.

- “(17) LB-X. The ginger root, golden seal root, capsicum fruit, and fennel seeds contained in this product coalesce (sic) to make a very soothing, bitter tea. Incidentally, fennel seeds have been used as a spice for several decades.
- “(18) PT-X. This herbal product is substantially the same as P-X.
- “(19) ART-A 4X. This herbal product has been concentrated so it can be easily used in soups and stews. Bromelaine, an enzyme extracted from pineapple, is an effective food tenderizer. Yucca root is a starchy substance that is similar to potatoes. When those two items are added to the potpourri (sic) of flavors provided by the rest of the items contained in ART-A, it is easy to see why ART-A is a desirable (sic) ingredient to any soup or stew.
- “(20) AG-X. The tea brewed with this product is on the sweet side and has a very pleasant fragrance. The sweetness is provided by the papaya fruit and the savory aroma is provided by the peppermint and spearmint leaves and the ginger root.
- “(21) BP. When brewed, this herbal capsule yields a bitter, but pleasant tea that offers a hint of sweetness from licorice root.
- “(22) BW-X. The golden seal root and the capsicum fruit contained in this herbal product results in a beverage that has a bitter spicy (sic) taste.
- “(23) RE-X. Although the primary ingredient of this product (black cohosh) is somewhat bland, when that ingredient is blended with the other ingredients of RE-X, the result is an exceptionally pleasant tasting herbal tea. The wood betony herb and the lobelia herb, in particular, counterbalance the bland taste of the black cohosh herb.
- “(24) RF-X. This herbal product is primarily used as an ingredient in soups.
- “(25) BLG-X. The brewing of this product yields a particularly fragrant herbal tea. The strong fragrance is attributable primarily to the essential oils of the barberry root bark and the cramp bark. Background flavors and fragrances (sic) are provided by ginger, fennel seed, and cat nip.

- “(26) AR-X. The high starch content in the roots and herbs contained in this capsule makes this product an ideal candidate for any soup kettle.
- “(27) KC-X. This product is also very suitable for the making of soups. Its primary ingredient, irish moss, is a carbohydrate which will jell or thicken when added to water. Irish moss is used by the food industry as a thickening agent in such products as soups, ice cream, jello, and pudding.
- “(28) NF-X. When placed in hot water, NF-X capsules result in a very soothing, bitter tea. The bitterness is attributable to the golden seal root. That bitterness is somewhat counterbalanced by the soothing effects of raspberry (sic) leaves and squawvine herb. This latter herb has been used for centuries to brew Indian tea.
- “(29) :-X. The brewing of these herbs result in a fairly sweet-flavored herbal tea.
- “(30) I-X. The pleasant sweetness of tea brewed from this blend of herbs is primarily attributable to the red sugar beet root contained in that blend.
- “(31) CT-X and 42D-X. Both of these products provide a “very flavorful tea when brewed in hot water. It should be noted that the labels for each of these herbal capsules describe those capsules as “Herbal Food Combination.” (42D-X is the successor of PNC.)
- “(32) ML-X. This blend of herbs offers an exotic bitter tonic flavor when brewed in hot water.”

In your letter of June 20, 1982, you also inquired about the following products:

1. Kelp
2. Licorice Root
3. Herbal Beverage
4. Concentrated Chickweed
5. Concentrated Alfalfa
6. Concentrated Black Walnut

Sales and Use Tax Regulation 1602 provides, in part, in paragraph (5) that:

“... unusual foods such as brewer’s yeast, wheat germ and seaweed are not subject to tax except when their label states that they are a food supplement or the equivalent....”

We do not consider the fact that the herbal capsules are recommended to be taken as “an addition to the everyday diet” to constitute a classification of these products as food or dietary supplements. We are therefore of the opinion that the various herb and spice capsules listed above are all “unusual foods” which qualify as food products as that term is defined in Regulation 1602. As such, tax does not apply to the sale of these products.

If you have further questions concerning this matter, please write this office.

Very truly yours,

Mary C. Armstrong
Staff Counsel

MCA:jlc