

**M e m o r a n d u m****245.1633**

To : Mr. Vic Anderson  
Supervisor, Audit Evaluation  
and Planning Section

Date: September 9, 1999

From : David H. Levine  
Supervising Tax Counsel

Telephone: (916) 445-5550  
CalNet 485-5550

Subject: PediaSure

This is in response to your memorandum dated June 25, 1999 regarding PediaSure. You are reviewing a letter written by the Santa Rosa District office which concluded that sales of PediaSure come within the exemption provided by subdivision (a) of Revenue and Taxation Code section 6359. The district concluded that the product is not a "complete dietary food" under Regulation 1602, but it nevertheless concluded that the exemption applied because PediaSure is "essentially a milk product." The district has not properly analyzed the question presented.

The section 6359 exemption applies only to sales of "food products for human consumption." The design of the statute is to first generally define in subdivision (b) what products come within the term "food products." Subdivision (c) then excludes certain items from the definition of food product. That is, an item may otherwise be included as a food product in subdivision (b), but then have that definition snatched away by subdivision (c). However, if we had already determined that the product was *not* a food product prior to reaching the subdivision (c) issue, we would never reach that issue.

Similar to the statute it applies, Regulation 1602 includes in subdivisions (a)(1) and (a)(2) a number of items which are regarded as food products. Unless a product qualifies as a food product under the general rules of Regulation 1602, the analysis can be terminated: the sale of the product does not qualify for the food products exemption. If, however, the product *generally* qualifies as a food product, the analysis must proceed to the exclusions of Regulation 1602. Contrary to the analysis of the district, while a milk product is generally a food product, the analysis has just begun. We must then determine if that milk product is snatched from the definition of food product by subdivision (a)(4) or (a)(5) of the regulation.

A basic quart container of milk obviously comes within subdivision (b)(2) of section 6359 and subdivision (a)(1) of Regulation 1602. Thus, when a carton of milk is simply sold as milk, it is clearly a food product for purposes of the exemption. However, if the seller labels and sells the carton of milk as a supplement within the meaning of Regulation 1602, then the carton of milk is just as clearly excluded from the otherwise applicable food product definition by subdivision (a)(5) of Regulation 1602. That the carton contains milk brings the product within subdivision (a)(2) of Regulation 1602; the labeling takes it out of the definition of food product.

PediaSure comes within the general definition of food product. However, it is labeled as a supplement, and accordingly is excluded from the definition of food product unless qualifying as a complete dietary food for purposes of subdivision (a)(5) of Regulation 1602. You ask whether the label's statement that PediaSure can be used for total nutritional support is sufficient. No, it is not; however, it is one element of the analysis.

As you know, we have concluded that Ensure and products substantially identical in labeling and content to Ensure qualify as complete dietary foods under Regulation 1602. There are two essential differences between PediaSure and Ensure: the former is specifically labeled for use by children aged 1 to 10; and PediaSure has slightly less nutritional content than does Ensure. If PediaSure's label were consistent for use by adults, we would conclude that its nutritional content is insufficient to be regarded as a complete dietary food under Regulation 1602. However, when used as labeled, PediaSure has at least the same nutritional value for children aged 1 to 10 as does Ensure for adults, which is consistent with its labeling that it can be used for "total nutritional support." We conclude that the supplement exclusion does not apply, and that PediaSure is a food product, sales of which are exempt from tax.

DHL/cmm

cc: Ms. Freda Orendt-Evans (MIC:92)  
Mr. Larry Bergkamp (MIC:40)  
Ms. Lynn Whitaker (MIC:40)