

**STATE BOARD OF EQUALIZATION**

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January 26, 1989

Mr. B--- T. O---
Certified Public Accountant
XXXX West --- Boulevard, Suite X
---, CA XXXXX

Dear Mr. O---:

Your letter of November 14, 1988 requesting an opinion concerning the correct application of tax to the gross receipts from sales of certain weight loss products has been referred to me for a reply.

As I understand the facts, you represent Dr. S---, a medical doctor who maintains a medical weight control practice. He furnishes two products called "Medifast 70" (manufactured by J--- Pharmaceuticals) and "Pro-Call 100" (manufactured by R--- Products, Inc.) to his patients for the treatment of obesity. Both products are packaged in powdered form and are mixed with water for consumption. The label for "Medifast 70" describes the product as a "modified fasting supplement" while the label for "Pro-Call 100" describes this product as a "Balanced Dietary Food Supplement." In addition, the labels for these products also indicate that these products provide the use with a daily intake of 500 calories or less per five servings. Finally, you write that both products are not sold over the counter but are sold only to physicians. You inquire whether these products qualify as prescription medicines.

Tax does not apply to the gross receipts from the sale of medicines furnished by a licensed physician to his own patient for the treatment of that patient (see Sales and Use Tax Reg. 1591(a)(2), copy enclosed). The term "medicine" is defined to include any substance or preparation intended for the internal application to the human body in the treatment or prevention of disease (Reg. 1591(b)(1)). In our view, obesity is a disease and substances or preparations intended for internal application to the human body used to treat obesity qualify as medicines. "Medifast 70" and "Pro-Call 100" are described as products to be ingested to reduce weight. Accordingly, the gross receipts from Dr. S---'s sale of "Medifast 70" and "Pro-Call 100" furnished to his patients for the treatment of obesity are not taxable pursuant to Regulation 1591(a)(2).

You also inquire whether "Medifast 70" and "Pro-Call 100" would qualify as food products.

Tax does not apply to the gross receipts from the sale of food products for human consumption (Reg. 1602(a), copy enclosed). However, the term "food products" does not include any product in powdered form which is described on its package or label as a food or dietary supplement or is designed to decrease caloric intake (Reg. 1602(a)(5)). We note however that complete dietary foods providing the user with an adequate caloric intake (900 calories) do qualify as food products (Reg. 1602(a)(5)).

Applying the above criteria, it is our opinion that "Medifast 70" and "Pro-Call 100" do not qualify as food products since the labels for these products describe the products as food or dietary supplements designed to decrease caloric intake. Further, we note that these products cannot be considered a complete dietary food since the products do not contain an adequate caloric intake of 900 calories.

I hope the above information is helpful. If you have any further questions concerning this topic, please do not hesitate to contact this office.

Very truly yours,

Robert J. Stipe
Tax Counsel

RJS:sr

Encs.