STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

WILLIAM M. BENNETT
First District, Kentfield

BRAD SHERMAN
Second District, Los Angeles

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

MATTHEW K. FONG
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

BURTON W. OLIVER
Executive Director

August 4, 1992

Ms. [S]
XXXXX --- ---
--- ---, CA XXXXX

Re: RE-VITA LIQUA HEALTH
Dietary Supplements

Dear Ms. [S]:

I am responding to your letter to the State Board of Equalization dated June 4, 1992. You said that you bought a product called RE-VITA LIQUA HEALTH from a company in Florida and was charged sales tax on your purchase. When you called the company, they told you that California did not consider their product a food. You asked if the company was justified in charging you tax.

You sent one of the boxes which described the product. It is a powdered product which must be mixed with milk to be consumed. Each packet supplies 30 calories, 3 grams of protein, and about 35% of the minimum RDA of vitamins and minerals. It can be consumed "in place of a meal or as an energizer." The package further describes the product as follows:

> "Re-Vita is convenient, economical and safe; an ideal way to maintain your weight."

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall the presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who

makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.2d 201.] The taxpayer has the burden of showing that he clearly comes within the exemption." Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption.

Section 6369, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered "food products." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) Sub-division (a)(5), however, excludes certain items from the definition of "food products" as follows:

> "(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"

Regulation 1602 subsequently restricts this limitation on the definition of "food products" as follows:

> "Tax, however, does not apply to any such products which either are exempted by Section 6369, respecting prescription medicines, or are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and foods providing adequate caloric intake. An example of the latter is a food daily requirement providing the user with the following:
>
> 1. 70 grams of high quality protein
> 2. 900 calories
> 3. Minimum daily requirements as established by the regulations of the Federal Food and Drug Administration of the following vitamins: A, B1, C, D, Riboflavin, and Niacin or Niacinamide; the following minerals: Calcium, Phosphorus, Iron and Iodine."

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) thus sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms- liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then its sales are taxable if one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement, or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories.

C. Tax Consequences.

RE-VITA LIQUA HEALTH is in powdered form, so it is subject to Regulation 1602(a)(5). The package describes it as a weight-maintenance product and also as an energizer (a food supplement). It does not qualify as a complete dietary food in that, if used to replace three meals a day, it provides negligible amounts of calories (90) and protein (9 grams). In determining the food value of a powdered product, we may consider only that supplied by the product itself, and not the liquid with which it is mixed. As a result, we may not look at any food value contributed by the milk.

Thus, based on the above standard, we agree with your seller that RE-VITA LIQUA HEALTH does not qualify as a “food product” for sales tax purposes. Consequently, tax applies to its sale in California.

For your information, I have included a copy of Regulation 1602. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es
Enclosure: Regulation 1602