

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-97(16)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961107A

On November 7, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Reliv, Inc., P.O. Box 405, Chesterfield, MO 63006-0405.

The issue raised by Petitioner, Reliv, Inc., is whether certain of its dietary and nutritional products enumerated herein are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner sells nutritional, dietary, and skin care products through a multi-level network of independent distributors. Petitioner is considered an "MLM" or multi-level marketer, like Amway and Avon, who ships its products to various New York distributors for sale.

Petitioner's specific products in question are further described as follows:

- (1) "Cellebrate," a patented dietary food supplement that inhibits the absorption of fat.
- (2) "Celleboost," a dietary food supplement in pill form that inhibits fat absorption.
- (3) "Arthhaffect," a powdered nutritional supplement with Arthred, which has been clinically reported to nutritionally support healthy joint function.
- (4) "Ultrim-Plus," a powdered meal replacement product that is similar to "Slim-Fast" and is available in three flavors.
- (5) "FibRestore," a patented fiber-rich antioxidant supplement in powder form.
- (6) "Classic," a patented powdered nutritional supplement with beta carotene.
- (7) "NOW," a powdered nutritional supplement with vitamins, minerals and herbs.
- (8) "Innergize," a powdered sports drink similar to "Gatorade" which is available in three flavors.
- (9) "Ultrabars," fruit and nut bars that are fortified with vitamins, minerals and herbs, and are available in three flavors.

Applicable Law and Regulations

Section 1115(a) of the Tax Law provides, in part, that:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(1) Food, food products, beverages, dietary foods and health supplements, sold for human consumption but not including (i) candy and confectionery, (ii) fruit drinks which contain less than seventy percent of natural fruit juice, (iii) soft drinks, sodas and beverages such as are ordinarily dispensed at soda fountains or in connection therewith (other than coffee, tea and cocoa) and (iv) beer, wine or other alcoholic beverages, all of which shall be subject to the retail sales and compensating use taxes, whether or not the item is sold in liquid form . . . .

\* \* \*

(3) Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

Section 528.2 of the Sales and Use Tax Regulations provides, in part:

(b) Beverages, other than water. (1) Beverages sold for human consumption are exempt from sales and compensating use tax, except for:

(i) fruit drinks which contain less than 70 percent of natural fruit juices;

(ii) soft drinks, sodas and beverages, such as are ordinarily dispensed at soda fountains (other than coffee, tea or cocoa);

(iii) beer, wine and other alcoholic beverages.

(2) A beverage is a drink, whether sold in liquid form or otherwise.

(3) Fruit juices are exempt beverages. Fruit drinks, ades, nectars and cocktails which contain less than 70 percent natural fruit juices, are taxable.

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(c) Dietary foods and health supplements. (1) A dietary food is a food for a special dietary use for humans and which bears on the label a statement of the dietary properties upon which its use is based in whole or in part.

(2) Products which are intended to substitute for the ordinary diet, or supplement the ordinary diet, or substitute for natural foods are exempt, when sold for human consumption. Among these are liquid diet products, artificial sweeteners and vitamins.

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Petitioner submitted labels from each of its nine products in question. On the labels of product numbers 1 and 2, "Cellebrate" and "Celleboost" are classified as dietary supplements which are used to aid the customer in losing excess weight by controlling hunger and decreasing body fat. Product numbers 6, 7 and 9, "Classic," "NOW" and "Ultrabars," are nutritional supplements whose principal ingredients are proteins, vitamins, minerals and herbs. Product number 4, "Ultrim-Plus," is a liquid diet product similar to "Slimfast." New York State Department of Taxation and Finance Publication 880, Taxable and Exempt Foods and Beverages Sold at Retail Food Markets and Similar Establishments, contains a partial list of foods and beverages that are taxable or exempt. All of the aforementioned products are similar to other products listed in Publication 880 which are not taxed for sales tax purposes. Therefore, these six products are considered food items in accordance with section 1115(a)(1) of the Tax Law and section 528.2(c)(2) of the Sales and Use Tax Regulations and are exempt from sales tax.

Product numbers 5 and 3, "FibRestore" and "Arthaaffect," are said to nutritionally supply the body in its mission to maintain health and joint function, respectively. They are similar to other exempt products listed in New York State Department of Taxation and Finance Publication 820, Taxable & Exempt Drugs, Medicines and Toiletries. As such, these two items are considered products consumed for the preservation of health in accordance with section 1115(a)(3) of the Tax Law and section 528.4(a)(1) of the Sales and Use Tax Regulations and are exempt from sales tax.

Lastly we address Petitioner's product number 8, "Innergize." Petitioner portrays this product as a sports drink similar to "Gatorade." This constitutes the sale of a beverage pursuant to section 528.2(b) of the Sales and Use Tax Regulations. "Gatorade" is listed in Publication 880, supra, as a taxable item. Petitioner's product contains less than 70 percent of natural fruit juice, an

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amount required for sales tax exemption within the meaning and intent of section 1115(a)(1) of the Tax Law and under section 528.2(b)(3) of the Regulations (see Matter of Rich Plan of Utica, Inc., State Tax Commission, February 10, 1981, TSB-H-81(20)S). Accordingly, receipts from the sales of this product are subject to tax.

DATED: March 27, 1997

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.