

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

TSB-A-97(76)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970924A

On September 24, 1997, 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 receipts from the sales of its product called "ProVantage" 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 submitted the label from its ProVantage product for review. ProVantage is described on the label as "the ultimate in sports nutrition." It is a soy-based performance enhancer which scientifically stimulates energy production while increasing endurance and lean muscle mass production. Nutrients in ProVantage are said to boost the immune system, heighten clear thinking and protect the body down to the cellular level. ProVantage provides protein from soy, described on the label as "a source proven to protect the body from the development of coronary artery disease, certain cancers and menopausal symptoms."

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes sales tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

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

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 . . . whether or not the item is sold in liquid form. . . .

Section 528.2(c) of the Sales and Use Tax Regulations provides:

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.

Opinion

According to the label on the product, ProVantage is scientifically designed to enhance sports performance by supplying protein (from soy) to the body which stimulates energy production and increases endurance and lean muscle mass production. Nutrients in ProVantage promote general health and well being by boosting the immune system, and protecting the body down to the cellular level.

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 from sales and use taxes when sold at retail food markets and similar establishments. ProVantage is similar to certain other products listed in Publication 880 which are not taxed for sales tax purposes. ProVantage is considered both a dietary food and a health supplement in accordance with Section 1115(a)(1) of the Tax Law and Sections 528.2(c)(1) and (2) of the Sales and Use Tax Regulations and is therefore exempt from sales tax.

DATED: December 4, 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.