

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(36)S
Sales Tax
July 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011002A

On October 2, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Mannatech Incorporated, 600 S. Royal Lane, Suite 200, Coppell, Texas 75019.

The issue raised by Petitioner, Mannatech Incorporated, is whether, various products which they produce are subject to New York State sales and use tax.

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

Petitioner is a multilevel marketer of dietary supplements based in Coppell, Texas. Petitioner's products are designed to use nutrients working through normal physiology to maintain optimal health through improved nutrition.

Petitioner markets dietary supplements that scientifically address nutritional support from two distinct approaches. The first is the need for a general diet plan that addresses an individual's need for recommended amounts of proteins, fats, and carbohydrates, and the appropriate supplements to support those genetic requirements. This is accomplished through Petitioner's proprietary program of Metabolic Profiling. The second approach centers around plant-synthesized molecules that are not found in our diets, but have been shown to have dynamic impact on our ability to achieve optimal health. Petitioner has provided descriptions of the specific products in question including the benefits of the products. Petitioner's specific products in question are briefly described as follows:

- A. **Ambrotose™** - Dietary supplement in capsule form.
- B. **Ambrotose™ Powder** - Dietary supplement in bulk powdered form designed to be mixed with juice or water before human consumption.
- C. **AmbroStart** - Dietary supplement with Ambrotose™ complex in bulk powdered form to be mixed with water or juice before human consumption.
- D. **Ambrotose™ with Lecithin** - Blend of Ambrotose™ complex and soy lecithin in capsule form, a dietary supplement of monosaccharides.
- E. **Mannatonin** - Dietary supplement with melatonin in tablet form.
- F. **PLUS** - Dietary supplement combination of dioscorea, Ambrotose™, and beta sitosterol in caplet form.
- G. **MVP** - Dietary supplement, same combination found in PLUS caplets with a blend of herbs.
- H. **Profile 1** - Dietary supplement in tablet form.
- I. **Profile 2** - Dietary supplement in tablet form.

- J. **Profile 3** - Dietary supplement in tablet form.
- K. **GlycoBears** - Chewable childrens multivitamin.
- L. **EM -PACT™ Powder** - Bulk powder designed to be mixed with water to form a nutritious drink that supports athletic performance during a workout.
- M. **SPORT** - Dietary supplement in capsule form.
- N. **Manna Cleanse™** - Dietary supplement in caplet form.
- O. **Manna-C** - Dietary supplement with Ambrotose™ complex.
- P. **Phyt-Aloe®** - Dietary supplement in capsule form.
- Q. **Phyt-Aloe® Powder** - Dietary supplement in bulk form.
- R. **Phyto-Bears®** - Dietary supplement in gummi-bear form.
- S. **Optimal Health Pack** - Packets of three dietary supplements(**Ambrotose™**, **Phyt-Aloe®**, and **PLUS**) in caplet form.
- T. **ImmunoStart** - Dietary supplement in chewable tablet form.
- U. **Emprizone Antiseptic Gel** - An antiseptic hydrogel for treatments of minor burns, scratches, cuts, insect bites, and other minor skin conditions to help prevent against infection.
- V. **FIRM Lotion** - Transdermal formula with other herbal body-toning ingredients.
- W. **Ambroderm Lotion** - Natural skin care product.
- X. **GlycoLean Accelerator** - Blend of thermogenic (fat burning) agents along with special nutrients for increased energy.
- Y. **GlycoLean Manager** - Blend of Thermogenic (fat burning) agents with nutrients for energy.
- Z. **GlycoLean Catalyst** - Multiple vitamin optimized specifically for fat loss.
- AA. **GylcoLean FiberFull** - Fiber product to improve colon health.
- BB. **GlycoSlim Drink Mix (Chocolate)**- A meal replacement shake.
- CC. **GlycoSlim Drink Mix (Vanilla)** - A meal replacement shake.
- DD. **Manna Bar Protein Formula** - Dietary supplement in breakfast bar form.
- EE. **Manna Bar Vanilla Yogurt Coated Apple Crunch** - Dietary supplement in breakfast bar form.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes a 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. . . .

* * *

(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

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.

Section 528.4 of the Sales and Use Tax Regulations provides, in part:

(a) Exemption. (1) Drugs and medicines intended for the 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 are exempt.

* * *

(b)(3) Products consumed by humans for the preservation of health include other substances used internally or externally, which are not ordinarily considered drugs or medicines.

Example 1: Analgesics, antiseptics, antacids, cough and cold remedies, laxatives, aspirin, boric acid ointment, cod liver oil and castor oil are exempt.

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(c) *Cosmetics*. Articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into, or otherwise applied to the human body for cleansing,

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beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of any such articles are subject to tax.

Opinion

Petitioner's products designated in the facts above as A-T, X-Z, and BB-EE as described are products which scientifically address nutritional support as a substitute for the ordinary diet, supplement the ordinary diet, or substitute for natural foods and are exempt, when sold for human consumption. See Section 528.2(c) of the Sales and Use Tax Regulations. Accordingly, as provided in Section 1115(a)(1) of the Tax Law, the sale of these products for human consumption are exempt from State and local sales and use taxes.

The product designated as U, *Emprizone Antiseptic Gel* is described as an antiseptic for the treatment of minor burns, scratches, cuts, insect bites, and other minor skin conditions to help prevent against infection. The product designated as AA, *GlycoLean FiberFull* is described as a fiber product that improves colon health and improves elimination. *Emprizone Antiseptic Gel* and *GlycoLean FiberFull* are considered to be exempt medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or products consumed by humans for the preservation of health as provided for in Section 1115(a)(3) of the Tax Law. Therefore, the sale of *Emprizone Antiseptic Gel* and *GlycoLean FiberFull* are exempt from State and local sales and use taxes.

The products designated above as V and W, *FIRM Lotion* and *Ambroderm Lotion*, are products which are intended to be rubbed, poured, sprinkled or sprayed on the human body for beautifying, promoting attractiveness, or altering appearance and are deemed to be cosmetics as defined in Section 528.4(c) of the Sales and Use Tax Regulations. Under Section 1115(a)(3), cosmetics are subject to sales and use tax notwithstanding the presence of medicinal ingredients in such cosmetics. Accordingly, the sale of *FIRM Lotion* and *Ambroderm Lotion* are subject to State and local sales and use taxes.

DATED: July 25, 2002

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