



STATE BOARD OF EQUALIZATION

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March 27, 1985

Your letter of January 11, 1985, addressed to Tax Counsel Charles Graziano, has been referred to me for response. You write that:

“I have a food business that is 85 to 90 percent ‘to go’ that does more than 80 percent of its sales in food and more than 80 percent of its sales in taxable items.

“I have two examples that I would appreciate clarification on whether they are taxable under the new AB 2432 (Klehs) law:

“1) A pint of cold cole slaw (which serves 4 people) bought ala carte ‘to go’. We sell many difference kinds of cold salads in ½ pints, pints, and quarts, for ‘to go’ purposes. In the past the ala carte salads ‘to go’ were not taxes but when included in any type dinner package were taxes, for either eat in or ‘to go’.

“2) A bottle of B.B.Q. sauce, 18 fl. oz., purchased ‘to go’.”

AB 2432, effective January 1, 1985, added paragraph (6) to subdivision (d) of Section 6359 of the California Revenue and Taxation Code. This change effectively provides that previously exempt sales of “food to go” by certain businesses are not taxable if certain conditions are met. Revenue and Taxation Section 6359(d)(6) (attached) provides:

“(d) None of the exemptions provided for in this section apply to any of the following:

“(6) When the food products sold are furnished in a form suitable for consumption on the seller’s premises, and both of the following apply:

“(A) Over 80 percent of the seller’s gross receipts are from the sale of food products.

“(B) Over 80 percent of the seller’s retail sales of food precuts are sales subject to tax pursuant to paragraphs (1), (2), (3), or (7).”

Accordingly, the sale of food products such as ice cream, milk, milkshakes, hot and cold coffee, cold sandwiches, cookies and donuts furnished in a form suitable for immediate consumption on the seller’s premises, when sold by business such as restaurants, fast food

establishments, concessionaires, soda fountains, and other similar places of business, even though sold on a “to go” or “take out” basis, are now subject to tax if both of the above conditions are met.

The application of tax to the sales of food products remains the same for those businesses not meeting both criteria. In addition, sales of food products when furnished in a form not suitable for consumption on the seller’s premises remain exempt. Examples of this type of food or a gallon of ice cream, a quart of salad, or a whole pie. Food products that require further processing are also considered not in a form suitable for immediate consumption. Examples are “coke” syrup which must be mixed with carbonated water to make soda or frozen foods which must be defrosted before eating. However, when items such as pints of milk, ice cream cones, pieces of pie or donuts are purchased in large quantity, they are still considered to be in a form suitable for immediate consumption on the seller’s premises, i.e., a sale of a dozen donuts would be in a form suitable for immediate consumption and be subject to tax if criteria of paragraph (6) are met.

You write that your food business “does more than 80 percent of its sales in food and more than 80 percent of its sales in taxable items.” Your business meets the first criteria of Revenue and Taxation Code Section 6359(d)(6) in that more than 80 percent of your gross receipts are from the sale of food products. If, by “more than 80 percent of its sales in taxable items,” you mean that over 80 percent of your sales of food products are taxable, then your business meets the second criteria. Sales of taxable non-food items and sales such as “cold food to go” which may become taxable under the new criteria should not be used in computing the taxable percentage.

We assume, for purposes of this opinion, that your business meets the criteria of Revenue and Taxation Code Section 6359(d)(6). In response to your specific examples:

1) A pint (or any other size smaller than a quart) of cold cole slaw bought ala carte “to go” is taxable because it is furnished in a form suitable for consumption on your premises. A quart (or any larger size) of cold salad, sold ala carte “to go” is furnished in a form not suitable for consumption on your premises and is not taxable.

2) A B.B.Q. sauce in an 18 ounce bottle, purchased “to go”, is a good product requiring further processing, i.e., it would be added to other food before it was consumed. Therefore, the B.B.Q. sauce is not “furnished in a form suitable for consumption on the seller’s premises”; its sale is not subject to tax.

If we may be of further assistance, please write this office.

Sincerely,

James A. Davis
Tax Counsel

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