



**STATE BOARD OF EQUALIZATION**

LEGAL DIVISION - MIC 82  
450 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)

Telephone No.: (916) 324-3828  
Fax No: (916) 323-3387

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July 18, 1995

Mr. J. B--- G---  
President, B--- T---  
XXXX --- ---, #XXX  
---, California XXXXX

RE: [No Permit Number]  
Food Sales from Kiosks

Dear Mr. G---:

I am responding to your letter to the Legal Division dated January 27, 1995 and to our telephone conversation of June 20, 1995. You ask for a ruling as to whether sales tax applies to sales of coffee and espresso drinks from kiosks located in various places. We note that the Board staff cannot issue tax rulings; only the Board itself may do that. We can, however, give you our opinion regarding the correct application of tax to a given set of facts. I apologize for the delay.

**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 be 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.O.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) and (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.)

However, under certain conditions, sales of food products are subject to tax. Sales of hot prepared food products are taxable. Although hot coffee is considered a “hot prepared food product,” its sale for a separate price is exempt from tax unless otherwise specifically provided. (Reg. 1603(e).) Regulation 1603(f) provides that tax applies to sales of food products sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom a retailer contracts to furnish, prepare, or serve food products to others.

C. Tax Consequences.

“1. Sales of coffee & espresso drinks from an independently owned kiosk located within the lobby area of a major corporate headquarters. There is no seating provided. Customers purchase to-go drinks in paper cups from the kiosk. The customer may go into the company cafeteria to eat, or may take the drink to his work station.”

It has long been our position that paper cups are not “facilities” in and of themselves. There may be some seats in the lobby for the use of persons visiting the company. Where the person with whom a food retailer contracts provides tables and chairs for the general use of the people taking advantage of that person’s services, the fact that some patrons may choose to use those tables and chairs for consumption of the retailer’s products does not make the former “facilities” within the meaning of the regulation. We are of the opinion that the company cafeteria, which apparently is accessible from the lobby, does not in this case constitute “facilities” of the kiosk as the cafeteria is for the general use of the public, was presumably there before the kiosk was placed in the lobby, and operates without regard to the operating hours of the kiosk. In our telephone conversation, you indicated that the cafeteria was not open all day and, when it was, people bought food products there rather than from your kiosk. The fact that

some of the kiosk's customers may choose to take their purchases into the cafeteria does not, in this case, make the cafeteria "facilities" of the kiosk under Regulation 1603(f). In addition, the taxability of the kiosk's sales cannot, in this circumstance, depend on whether or not the cafeteria happened to be open when a particular cup of coffee was sold. We conclude, then, that the kiosk's sales of hot coffee and espresso drinks are not subject to tax under these facts.

"2. Sales of coffee & espresso drink from a kiosk located within a retail space of a large office building. All drinks are sold in to-go paper cups. The building manager provides seating and tables. 10% of all customers consume beverages at the provided seating areas. All other customers take their beverages to their offices.

"3. Sales of coffee and espresso drinks from an independently owned kiosk located within a major corporate dining room. All drinks are sold in to-go paper cups. Seating is provided within the dining room. Only 5% of all customers consume their beverages at seating within the dining room. All other customers take their beverages to their work stations."

The tax results in both of these situations are the same. Cold food products sold on a "to-go" basis are generally not subject to tax. (For the purpose of this analysis, hot coffee sold alone is considered, for the reasons discussed above, a "cold food product.") "To-go" sales of cold food are subject to tax, however, when the food is sold in a form suitable for consumption at facilities provided by the person with whom the retailer contracts to sell such products, 80% of his total sales are of food products, and 80% of those sales are subject to tax because they are meals sold by a restaurant or similar establishment, intended for consumption in parking facilities provided by the retailer, are hot prepared food products, or are sold in a form for consumption at facilities provided by the person with whom the retailer contracts (i.e. not sold "to go"). (Reg. 1603(c)(3).) Here, 100% of B--- T---' sales are of food products sold in individual servings suitable for consumption at the tables and chairs (i.e., the cafeteria) provided by the person with whom it contracts to sell the food. Are over 80% of those sales taxable for the reasons just set forth? The kiosk is not a restaurant, the food is not intended to be consumed in the parking lot, and the items sold are not hot prepared food products. Finally, you indicate that only 5-10% of the kiosk's customers consume its products at the facilities; the remainder take them back to their offices or work stations. Thus, we conclude that B--- T---' sales of food "to-go" from a kiosk with table and chairs or one located in the building cafeteria are not subject to tax. (Reg. 1603(c)(1)(B).) Tax does apply, however, to the sales of food actually consumed at the tables and chairs or in the dining room. (Reg. 1603(f).)

B--- T--- will need to obtain a seller's permit to report tax on such sales. You can obtain one from the --- District Office, located at XXXX --- ---, Suite 1, ---, California XXXXX-XXXX, telephone number XXX-XXXX.

For your information, I have included a copy of Regulation 1603, Tax Tip Pamphlet Number 22, "The Dining and Beverage Industry," and Tax Tip Pamphlet Number 73, "Your California Seller's Permit." I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Tax Counsel

JLW:sr

Enclosures: Regulation 1603  
Pamphlet No. 22

cc: --- District Administrator - --