

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA  
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August 22, 1990

Mr. J--- R. B---  
President  
I--- C---  
XXXX --- --- Avenue  
---, CA XXXXX

SY -- XX-XXXXXX

Dear Mr. B---:

Your letter of May 29, 1990 to Ms. C. L. Thomas has been referred to the legal staff for reply. You have requested clarification of Ms. Thomas' letter of May 21, 1990 regarding the correct application of tax to sales of pints, quarts and half-gallons of ice cream.

As we understand it, you operate ice cream parlors in --- and --- ---. You make some sales of pints and quarts of ice cream as well as sales of one or two scoops in a cup. You have been collecting sales tax reimbursement on the cups but not on the pints and quarts. Your inquiry concerns the correct application of tax to your sales of pints and quarts.

Effective January 1, 1985, the "80-80" rule was added to the Sales and Use Tax Law. This rule is clarified in Sales and Use Tax Regulation 1603(c), which provides that:

"Tax applies to sales of food products such as ice cream, milk, milkshakes, hot and cold coffee, cold sandwiches, and donuts furnished in a form suitable for consumption on the seller's premises, when sold by restaurants, fast-food establishments, concessionaires, soda fountains, and other similar establishments, even though such food products are sold on a 'take-out' or 'to go' order. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller's premises. In addition, tax does not apply under this paragraph if: ((1) 80 percent or less of the seller's gross receipts are from the sale of food products, or (2) 80 percent or less of the seller's retail sales of food products are taxable as provided in either (a), (b), (e) or (f) of this regulation. Any seller claiming a deduction for the sale of food products which is based on either (1) or (2) above must support the deduction by complete and detailed records of sales made."

We have determined that items sold in a quantity of less than a quart (e.g., a pint or a cup) are considered “furnished in a form suitable for consumption on the seller’s premises” even though these products are sold on a “take-out” or “to-go” basis. This is a standard rule applicable to many items including, but not limited to, ice cream, milk, yogurt and salads. As such, your sales of a pint of ice cream on a “to-go” basis are subject to tax.

If you have further questions concerning this matter, please write this office.

Very truly yours,

Mary C. Armstrong  
Senior Tax Counsel

MCA:wak