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 450 N STREET, SACRAMENTO, CALIFORNIA
 (PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
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 FAX (916) 323-3387

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April 22, 1998

Ms. J--- I---
 H--- H--- Restaurants, Inc.
 XXXX --- Avenue, Suite XXX
 --- ---, California XXXXX

**Re: H--- H--- Restaurants, Inc.
 SY -- XX-XXXXXX**

Dear Ms. I---:

This is in response to your letter dated February 24, 1998 regarding the application of tax to your company's sales of certain beverages.

You state:

“H--- H--- Restaurants, Inc. has a dual concept business with H--- H--- and H--- Juice. H--- H--- is a Japanese fast food restaurant specializing in the sale of teriyaki, tempura, chicken salad and noodle soups. H--- Juice offers fresh fruit smoothies which are cold food sold ‘to-go’. Sales for these two operations are rung up on separate cash registers. We believe Assembly Bill 1666, ‘the sale of cold food products “to-go” provided that seller keeps a separate accounting of the sale of these food products in his or her records, notwithstanding the fact that the seller may meet the 80/80 rule . . . applies to us. We are requesting a ruling on whether the fresh fruit smoothies are exempt from sales tax.”

DISCUSSION

Retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempted or excluded from taxation by statute. (Rev. & Tax. Code S 6051.) Revenue and Taxation Code section 6359 provides the relevant exemption for certain sales of food products. This exemption is explained in Regulations 1602 and 1603.

Section 6359(a) states the general rule that sales of food products for human consumption are exempt from tax. We assume that the smoothies are nonalcoholic, noncarbonated fruit juice

products. Regulation 6359(b)(3) lists fruit juices as being included in the definition of food products.

However, subdivision (d)(6) of section 6359 provides that the food product exemption does not apply:

“(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 products are sales subject to tax pursuant to paragraph (1), (2), (3), or (7).”

The description you have given of your business operations indicates that although separate cash registers are used for H--- Juice than for H--- H---, the equipment and employees operate out of the same business location, and both are owned by the same restaurant company. This means that for purposes of section 6359(d)(6), the juice “smoothie” sales are considered together with the meal sales (see Rev. and Tax. Code § 6359(d)(1)). If your company’s operations do not bring it within the 80/80 rule, the sales of the smoothies are exempt from tax when sold on a “take-out” or “to-go” basis. (Rev. & Tax. Code § 6359(e).) You have indicated that the restaurant’s operations bring it within the 80/80 rule. Notwithstanding your company’s operations bringing it within the 80/80 rule, if your company elects to separately account for sales of the smoothies, the gross receipts from sales of the smoothies sold on a “take-out” or “to-go” basis are exempt from tax as long as the separate accounting is fully documented in your company’s records. (Rev. & Tax. Code § 6359(f), Reg. 1603(c)(2)(B).)

If you have further questions, please feel free to write or call me at the address or telephone number listed above.

Sincerely,

Kelly W. Ching
Tax Counsel

KWC:cl

cc: --- --- District Administrator