

# Memorandum

**550.0848**

To : Mr. J. W. Cornelius, Supervisor  
Audit Evaluation and Planning Section  
(MIC:40)

Date: June 25, 1996

From : Anthony I. Picciano  
Staff Counsel

Subject: *J--- R--- - No Permit*

We have reviewed the information you sent regarding Mr. R---'s activities. Here is a suggested response to his letter.

In your letter dated February 6, 1996, which was in response to our telephone conversation on February 5, 1996, you explained that you are a private chef and that you make a living by preparing food for people in their homes. Usually, your clients have already purchased the food. However, occasionally you purchase the food for them and obtain reimbursement for the actual amount. You stated that you are not a caterer and that you get paid by the hour for your labor. Your charges to your clients are for your time for travel, shopping, cooking, and on rare occasions serving the food. All the food is prepared and eaten by the clients in their home. You are responsible for all your own taxes. You would like to know if your charges are subject to sales tax.

As a preliminary matter, Revenue and Taxation Code section 6596 is the only basis for relief of otherwise applicable tax and applies when the underreported tax is based on incorrect written advice provided to an identified taxpayer by a Board representative in response to a written request for advice. The opinion expressed in this letter may only be relied upon by you.

Section 6051 of the Revenue and Taxation Code imposes the sales tax on retailers for the privilege of selling tangible personal property at retail in this state. The measure of tax is based on gross receipts from the retail sales in this state of tangible personal property. Gross receipts include the total amount of the sale price of the retail sales of retailers without any deduction on account of the cost of the materials used, labor or service costs, interest paid, losses, or any other expense. (Rev. & Tax. Code § 6012(a)(2).)

Revenue and Taxation Code section 6006(d) defines "sale" for purposes of sales tax to include the furnishing, preparing, or serving for a consideration of food, meals, or drinks.

Sales and Use Tax Regulation 1603(h) provides that an individual who is engaged in the business of serving meals, food and drinks on the premises of another is a caterer, unless that person is an employee. Tax applies to all of a caterer's charges with no deduction on account of his or her time to prepare and serve meals, costs of food or drink, or any other expenses that he or she incurs.

A person is not an employee solely because he or she is hired by the hour or day. In an employment relationship, the employer withholds and pays social security and federal and state income taxes. The failure of a purported employer to withhold and pay such taxes is inconsistent with a claimed employment relationship. If the employer withholds, then the Board generally considers the relationship to be an employment relationship if other aspects of the relationship are not inconsistent with such a conclusion. On the other hand, if the individuals treat the arrangement as the hiring of an independent contractor without withholding, the Board generally accepts their apparent view of the relationship.

The fact that you charge by the hour for cooking, serving, and shopping for food does not necessarily support a conclusion that you are an employee for purposes of Regulation 1603(h). Since you pay your own federal, social security, and state taxes, we believe that you are an independent contractor. Therefore, you are a caterer under Regulation 1603(h) and all your charges are taxable.

Since you make taxable retail sales, you should obtain a seller's permit and report and pay sales tax to the Board on the gross receipts derived from those sales. Your gross receipts include all your charges, including those for reimbursement of cost of food.

I hope this information is helpful. If you have further questions, please feel free to contact me again. If you need to apply for a seller's permit, you may contact the Van Nuys District Office located at 6150 Van Nuys Boulevard, Room 205, P. O. Box 7735, Van Nuys, CA 91409-7735; telephone number (818)901-5293.

AIP:cl