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Memorandum

To: RF. A. Zuppan
Senior Tax Representative
Return Review Unit

Date: November 6, 1985

From: Robert J. Stipe
Legal

Subject: REDACTED TEXT

This is in response to your September 13, 1985 mini-memo requesting clarification of Revenue and Taxation Code section 6369(d)(6) which provides that sales of food items to be sold by certain businesses are taxable if certain conditions are met.

As we understand it, the taxpayer in question REDACTED TEXT operates a catering, restaurant and gourmet shop business at one location, although the restaurant and gourmet shop are a separate unit of the business. The "food to go" that is sold by REDACTED TEXT consists mainly of breads, cakes, pies (whole), ready-to-heat meals in containers that are not suitable for consumption on the premises, bulk salads and the like. It appears from the combined state and local sales and use tax return forms that over 80% of REDACTED TEXT's total retail sales of food products were subject to tax, although, according to REDACTED TEXT's personal records, less than 80% of the restaurant and gourmet shop's retail sales were subject to tax. You inquire whether the taxpayer should begin to collect tax on the sale of the "food to go" items.

AB 2432, Chapter 930, Statutes of 1984 (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 "take home food" by certain businesses are now taxable if certain conditions are met. Specifically, this section provides that tax applies:

- (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 paragraphs 1 (sale of food products served as a meal), 2 (food products furnished, prepared, or served for consumption at facilities provided by the retailer), 3 (food products ordinarily sold for immediate consumption at an establishment which is defined as a "drive-in"), or 7 (products sold as hot prepared food).

The description of REDACTED TEXT indicates that over 80 percent of their sales come from food products since they are primarily a catering and restaurant business. Therefore, REDACTED TEXT meets the first criterion of paragraph (6) in that “over 80 percent of their gross receipts are from the sale of food products”.

The second criterion of paragraph (6) is that over 80 percent of the retail sales of food products are taxable. REDACTED TEXT combined state and local tax sales and use tax return forms for 1984 indicate that over 80% of their retail sales of food products were subject to tax. REDACTED TEXT attempts to make a distinction between the catering component of the business and the restaurant and gourmet shop component as a separate unit of the business. The purpose of this distinction is to exclude the catering sales from the restaurant and gourmet shop sales when computing the 80 percent of retail sales subject to tax for purpose of paragraph (6)(B).

We have determined that for purposes of computing the percentages of sales pursuant to paragraph (6) each individual location will be considered as a unit in determining if the criteria are met. Therefore, REDACTED TEXT cannot separate the sales of the catering business from those of the restaurant and gourmet shop since both are located at one location and function as a business unit.

Therefore, since both the catering unit and the restaurant and gourmet shop much be considered as one business unit, and the retail sales of food products of the business that are subject to tax exceed 80 percent, REDACTED TEXT meets the second criterion of paragraph (6).

For vendors who meet both criteria of paragraph (6), the sales of food products in a form suitable for immediate consumption on the vendor’s premises, even though sold on a “to go” or “take out” basis, are subject to tax. Examples include the following: croissants, donuts, pastries, pints of milk, pints of coleslaw, pints of salad, individual bottles of juice, ice cream sandwiches, ice cream cones, cookies, brownies, milk shakes, cold sandwiches, pieces of pie or cake.

Sales of food products when furnished in a form not suitable for consumption on the vendor’s premises remain exempt even for vendors who meet both criteria of paragraph (6). Examples include the following:

- A whole cold chicken purchased to go.
- Party trays of meats and cheese.
- Hors d’oeuvres prepared and sold to go.
- Dinner rolls.
- A whole pie or cake.
- One quart of salad.
- One quart of ice cream.
- Bottled ice cream toppings.
- A bag of hamburger buns.
- A loaf of bread.
- A bottle of barbeque sauce.

As we under the description of the “food to go” sold by REDACTED TEXT (breads, whole pies and cakes, bulk salads, and ready-to-heat meals), none of the items are in a form suitable for consumption on the vendor’s premises. Therefore, REDACTED TEXT need not begin to collect tax on the sale of these items pursuant to paragraph (6).

For further information on this topic, please refer to Operation Memo No. 815 dated February 19, 1985 (Taxable Sales of "Food To Go"). If we may be of further assistance, please do not hesitate to contact us.

RJS:sr