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August 17, 1995

Ms. L--- Z---  
XXXX --- --- Way  
---, CA XXXXX-XXXX

Re: Sales of Food Products to Schools

Dear Ms. Z---:

This is in response to your letter dated June 20, 1995, in which you inquire about resale certificate documentation required for food products sold to schools.

You describe yourself as marketer for several fast food chains and indicate that you are approaching local schools to serve your clients' food items as part of a school lunch program. You indicate that you have encountered two types of lunch programs:

"1. Some schools want to res[ell] the food items at the same price they purchase the items for. I was told they do not charge the students tax at the time of purchase. Some of the food items will be used as an entire meal for children receiving free lunches.

"2. Other schools want to res[ell] the food items for a price greater than the purchase price. The profit will go toward school equipment."

In addition, you state that school districts purchasing through a central buying office provide you with seller's permit numbers in conjunction with their resale certificates. However, lunch programs which are run by PTA groups have not provided you with a seller's permit number in conjunction with their resale certificates. These groups have advised you that as non-profit organizations they are not required to hold seller's permits.

You have specifically inquired:

"Are we required to charge tax or are schools exempt? Are schools not required to hold seller's permits? How and where do we get the required forms, licenses or permits? What information must we keep on file if we do not charge tax?"

Retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) When sales tax does not apply, use tax applies to the use of property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) Your sales are presumed to be taxable retail sales unless you take, in good faith, from the purchaser a timely and valid resale certificate or, when applicable, a timely and valid exemption certificate. (Rev. & Tax. Code § 6091, Regulation 1667, Regulation 1668.)

The general rule is that sales of food products served as meals are taxable. (Rev. & Tax Code § 6359(d)(1).) However, Revenue and Taxation Code section 6363 provides an exemption from sales tax of gross receipts from the sale, use or other consumption of food products for human consumption which are furnished or served to students of a school by public and private school districts, student organizations, or parent-teacher association (PTA). This section is further explained in Regulation 1603(j), a copy of which is enclosed for your review.

In these situations, where the meals are provided by outside entities, such as yourself or the fast food chains, the sales of the meals will be considered nontaxable **if** the meals are first sold to the schools or PTAs before they are sold to the students. The sale to the school district or PTA would constitute a sale for resale while the subsequent sale to students would be considered nontaxable pursuant to section 6363. The school districts or PTAs must independently contract with the outside entity for the purchase of the food products. If the outside entity sells the food products directly to the students, such sales are not sales by the school and do not fall within the above exemption. (Business Taxes Law Guide (BTLG) Annot. 550.1180 (10/7/69).)

If the meals in question are first purchased from you or the fast food chains before they are sold to the students, these sales will be sales for resale. The subsequent sales of the meals to the students are exempt from tax. However, even if the subsequent sales of the meals to the students did not meet the requirements of section 6363, your direct sales to the school districts and PTAs for subsequent sale to the students would still be considered sales for resale.

In your letter you indicate that some of the school districts will be using the fast food products as components of prepared "free" lunches. It appears that this is mentioned out of concern as to whether these sales would be considered sales for resale if the students are not charged for the meals. In this case the school is a consumer of the property used to prepare the free lunches. As previously discussed, the general rule is that sales or use tax applies when a person purchases property from a retailer for use in California. However, section 6363

specifically provides that the exemption for school meals applies to sales, **use** or **other consumption** of food products **furnished** or **served** to students. Thus, as long as the food products purchased by the schools or PTAs are components of lunches furnished or served to the students, the exemption will apply to purchases of these food products. Under these circumstances, where the food is purchased to be used for serving free lunches, you should obtain an exemption certificate from the school or PTA. We are enclosing Regulations 1667 which explains the information that must be contained in an exemption certificate and when it must be issued. Exemption certificates are valid only if complete, timely, and taken in good faith.

Your last inquiries focus on the use and acceptance of resale certificates. Sales and Use Tax Regulation 1668, entitled "Resale Certificates," (copy enclosed), contains a resale certificate form that may be accepted from a purchaser if the purchaser intends to resell the property in the regular course of business. This regulation also explains when and how resale certificates should be issued and lists all of the information which must be contained in a valid resale certificate. Specifically, the certificate must contain:

The name and address of the purchaser;

The signature of the purchaser or agent of the purchaser;

The date of signature;

A description of the property purchased with a statement that the property is purchased for "resale." The terms "exempt" or "non-taxable" are not considered acceptable; and

The seller's permit number of the purchaser.

However Regulation 1668(b)(1)(C) provides that in cases where the seller is not required to hold a seller's permit i.e., is engaged only in selling food products for human consumption [when all the sales qualify for exemption under §6359], the purchaser must make an appropriate notation explaining why the purchaser is not required to hold a seller's permit.

A seller who does not receive a timely, complete resale certificate has the burden of proving that a sale of tangible personal property is not at retail. (Rev. & Tax. Code § 6091.) The certificate relieves the seller from liability for sales tax only if taken in good faith from a person who is engaged in the business of selling tangible personal property. (Rev. & Tax. Code § 6092.)

You have also inquired as to whether a school district is required to hold a seller's permit. I assume that this same inquiry extends to the PTAs. There are no specified categories of persons or entities which are exempted from this requirement. Rather, the focus is on the

activities of the person or entity. Revenue and Taxation Code section 6066 provides that every person who desires to engage in the business as a "seller" shall file an application for a seller's permit. Section 6014 of the Revenue and Taxation Code provides that the term "seller" includes every person engaged in the business of selling tangible personal property, [of a kind the retail sales] of which are required to be included in the measure of sales tax. Thus, if the school districts or PTAs are regularly involved in the business of making retail sales of tangible personal property they will be required to hold a seller's permit [unless those sales are limited to a kind of tangible personal property the retail sale of which is not subject to tax. Food products for human consumption, e.g., other than in the form of meals, is a kind of property the retail sale of which is exempt from tax].

If you have any more questions, please feel free to contact this office again.

Sincerely,

Patricia Hart Jorgensen  
Senior Tax Counsel

PHJ:cl

Enclosures: (Regs. 1603, 1667 and 1668)

cc: Sacramento District Administrator