

550.1753

Memorandum

To: REDACTED TEXT

Date: Jan. 23, 1978

From: Legal Counsel (SWM) - Headquarters

Subject: Sales of Hot Food

Your letter to Mr. Don Hennessy dated December 6, 1977 has been referred to my office for response. Specifically, you have asked for our opinion regarding the taxability of food that is sold by an operator of a food concession who has microwave ovens available for his customer's use.

You have stated that the taxpayer's premises consist of counters where food is dispensed cold. However, there are microwave ovens available for the customer's use. The operating procedure consists of the customer picking up the cold prepared food and then either:

- 1) heating the food in a microwave oven and then paying for it or
- 2) paying for the food and then heating it in the microwave oven.

Whether method 1) or 2) is used is entirely at the customer's discretion, but it is usually governed by the length of the cash register line and the length of the line by the microwave ovens.

Your major concern is with the food, which is of the type that is normally consumed at above room temperature, that is heated by the customer after he has paid for the product.

For purposes of this response we have assumed that the food products are not sold as meals, or for consumption at facilities furnished by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others, or sold in a place subject to an admission charge. (Revenue and Taxation Code Section 6359(a), (b), (c), and (d).)

Revenue and Taxation Code Section 6359 provides that there are exempted from taxes imposed by this part the gross receipts from the sale of food products for human consumption. This statute does not, however, exempt food products that are sold as hot food products. Revenue and Taxation Code Section 6359(e) defines "hot prepared food products" as "those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold."

The phrase "hot prepared food products" is further defined in Regulation 1603(d)(1). This section provides that:

“...The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in gravy, using infra-red lights, steam tables, etc. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product.”

It can be concluded that the above cited statute and regulation set out two tests which are to be used in determining if the product is taxable as a hot food product.

- 1) Is the product the kind which has been prepared for sale in a heated condition? and
- 2) Was the product sold at any temperature which was higher than the air temperature of the room or place where they are sold?

A literal interpretation of Revenue and Taxation Code Section 6359 would require that not only must the food have been prepared for sale in a heated condition but it must actually be hot when the customer pays for it unless there is some incidental cooling. This interpretation is consistent with Regulation 1574(a)(3)(A) which provides that irrespective of the presence of heating units, 33 percent of the gross receipts of any retailer from the sale at retail of food products (other than hot prepared food products) are subject to sales tax when sold through a vending machine. In other words, regardless of the presence of microwave ovens or heating units, in order for a food product to be classified as a “hot food product,” the food must have been prepared for sale in a heated condition and sold at any temperature which is higher than the air temperature of the place where they are sold.

When auditing a taxpayer’s premises which include microwave ovens, the sales should be regarded as taxable sales of hot food items if 1) the food is of the type which is normally consumed at above room temperature (such as your examples of scrambled eggs, pancakes and french toast) and 2) the microwave ovens are accessible only to the vendor. In these situations the fact that the customers cannot heat their own food is indicative of the fact that the vendor is in all probability selling the food to his customers in a heated condition. Likewise, if the heating units are readily accessible to the public, the sales should be regarded as exempt sales because the customers are probably buying the food cold and heating it themselves.

You have also asked if our response would be different if the food products sold were not of the type normally consumed hot, such as pies or bakery goods. Revenue and Taxation Code Section 6359(e) and Regulation 1603(d) provide that “hot prepared food products” do not include the individual sales of bakery goods. Consequently, no tax will apply to the sale of either hot or cold bakery products if they are sold separately.

If you have any questions regarding this analysis, I will be happy to discuss them with you.