550.1950

Memorandum

To: Mr. Robert H. Anderson
Mr. James E. Mahler
Mr. W. E. Burkett

Date: September 23, 1983

From: Gary J. Jugum

Subject: Sales of Hot Meals by River Rafting Companies

As everyone is generally aware, a question has been before the staff for some time concerning sales of hot meals by river rafting companies. Persons who operate such river rafting expeditions have argued that they are not retailers of meals because (1) the meals are furnished incidentally to the performance of a service and (2) the meals are furnished not on their premises and without facilities.

The staff position is that the river rafting operator is the retailer of the meals and that tax applies to sales of those meals constituting hot prepared food products. Separate analyses of these two issues are set forth in detail in my memorandum dated November 29, 1982, and in Mr. Charles J. Graziano's memorandum to me dated September 16, 1983. Copies of these two memoranda are attached for your consideration and use.

j:alicetilton

Attachments

cc: Business Taxes Attorneys
Hearing Officers
all w/attachments

Memorandum

To: Gary J. Jugum Date: 9/16/83

From: Charles J. Graziano

Subject: Sales of Hot Meals by River Rafting Companies

This is in response to your request of June 20, 1983 that I review the relevance of Sale Tax Counsel Opinions 550.0640, 550.1580, and 550.0100 to the application of tax to the furnishing of hot meals by river rafting companies.

Several river rafting companies have disputed the Board's assessment of tax on their sales of hot meals and have petitioned for a redetermination. It is the staff's position that the serving of hot meals to passengers on multi-day river rafting trips constitutes a retail sale which is subject to tax. The petitioners, in support of their argument that there is no taxable retail sale and that their serving of meals is exempt from tax under Section 6359 of the Revenue and Taxation Code, have cited Sales Tax Counsel (STC) Opinions 550.0100, 550.0640, and 550.1580. Questions have been raised by the staff as to what impact these cited staff opinions may have on this matter. For the reasons detailed below, it is my opinion that these STC opinions have no relevance on the taxation of hot prepared meals served by the petitioners.

Typically, commercial white water rafting in California consists of taking groups of people down various rivers which have navigable rapids. None of the land or campsites along the river is owned by the rafting companies. These river trips are conducted by trained guides, often lasting from one to seven days. Apparently, three days is the average duration for such trips. For multi-day trips, the passengers provide their own gear and eating utensils, and the companies provide, for a lump-sum charge, the guides, boating equipment, cooking gear, and food consumed by the passengers. During the multi-day expeditions, the guides prepare the meals consumed by the passengers. Typically, the lunches consist of cold sandwiches, whereas the breakfasts and dinners comprise both hot and cold foods.

The first argument raised by the petitioners is that they are consumers of the food items "incidentally" supplied to their passengers during the river trips. This argument, which relies upon Sales and Use Tax Regulation 1501, is answered in your memo of November 29, 1982 (copy attached). The second argument made by petitioners is that the sales of the prepared foods provided on the river trips are exempt from tax under Section 6359. I disagree with petitioners' interpretation of Section 6359.

First, the petitioners argue that in order for there to be a taxable sale of food or meals the party must maintain a "premises" or "facility" at which the food is consumed. Since the meals are not prepared or consumed on any property belonging to the petitioners, the petitioners claim there is

no taxable sale. Apparently, as used by the petitioners, the terms "premises" and "facilities" are thought to be interchangeable.

In support of their position that tax will only apply to sales of food or meals where the seller maintains a "premises," the petitioners cite STC Opinions 550.0100, 550.0640, and 550.1580. A brief summary of these opinions is as follows.

Sales Tax Counsel Opinion 550.1580 concerns the application of tax to the sale of food delivered in returnable containers or pots in which it was cooked. We stated that it was our opinion that the sale of cooked foods for consumption away from the seller's premises is exempt from sales tax as a sale of food products for human consumption under Section 6359 of the Revenue and Taxation Code, provided that the containers or pots are used only to deliver the food to the buyers and that the seller did not provide any dishes or other tableware. (January 31, 1955.)

In STC Opinion 550.0640, we stated that tax does not apply to a sale of prepared food delivered in nonreturnable containers for consumption away from the seller's premises, provided that the seller was not a drive-in establishment and that the seller did not provide tableware or other facilities for its consumption. (August 18, 1964.)

Sales Tax Opinion 550.0100 concerns the application of tax to the sales of meals by an independent contractor to farm laborers while they were working in the fields. Under the facts given, the contractor prepared the meals, packed them into "hot bulk food containers", and trucked the food to the field where the laborers were assembled. The contractor then dished out the food onto the disposable paper plates of the laborers as they filed past the contractor's truck. The laborers consumed the food using disposable plastic eating utensils while sitting on the ground near the parked truck. No permanent facilities such as tables, benches or chairs were provided for the laborers' use.

Although we determined that a meal was sold under these conditions, it was our position that a meal was not "served," since no "taxable facilities" were provided by either the contractor or the laborers' employer. Therefore, we concluded that the sale of such meals was an exempt sale of food products for human consumption rather than the taxable serving of a meal. (June 6, 1962.)

The issue in each of these cases was whether the sale of food on a "take-out" basis was exempt from tax. In these cases, the staff concluded that there was a sale of meals or food products, but that the sale was exempt under Section 6359 of the Revenue and Taxation Code as it read prior to 1972.

Prior to 1972

The cited opinions reflect the staff's interpretation of the law in effect prior to 1972 in regards to the sale of food on a "take-out" or "to-go" basis. At that time, the staff did not regard the sale of meals to be a "serving" of a meal under Section 6359 (a), unless permanent "facilities" were provided by someone, (either by the seller or, as in the case of STC Opinion 550.0100, the contractor or the laborers' employer) for consumption of the food. Once it was established that a meal was sold and that "facilities" were provided, a meal was deemed to be "served" and subject to tax. The term "facilities," as used by the Board, pertained only to tables, chairs, counters, trays, glasses, dishes, and other items of tableware which were provided by the seller. As used by the Board, the term "facilities" did not pertain to the seller's premises or location. If the food sold did not constitute a meal, the sale of food products was not subject to tax unless the retailer provided

"facilities" for its consumption, as provided under section 6359(b). Consequently, if the food was not sold for immediate consumption on or near the retailer's location and no "taxable facilities" were provided for consumption of the food, the food was considered to be sold on a "take-out" basis and not subject to tax. After 1963, a sale by a drive-in type establishment was also exempted from tax if the food was sold in bulk, i.e., in a form or amount which was not suitable for immediate consumption on or near the retailers premises.

Applying these principals, the staff concluded in STC Opinions 550.1580 and 550.0640 that the sale of food was exempt from tax, because the containers used to transport the food were not used in its consumption, and that no other "facilities" were provided.

In STC Opinion 550.0100, the staff concluded that the sale of meals to farm laborers was not subject to tax, since the meals were not "served." At that time, it was the staff's position that the "facilities" provided must be of a durable nature and that disposable tableware, such as paper dishes and plastic eating utensils did not constitute "taxable facilities." Since only disposable dishes and eating utensils were used by the laborers, the meals served to them in the fields were not considered by the staff to be taxable.

Apparently, the staff's position in regards to the distinction between disposable and durable tableware was based on dicta stated by the Supreme Court in Treasure Island Catering Co. v. State Board of Equalization, 19 C.2d 181 (1941). In this case, the actual holding of the Court was that the question as to whether paper napkins were "tableware" was for the trial court, which there found that the napkins were furnished not as tableware, but as a convenience for the handling or carrying of sandwiches sold. By way of dictum, the Court applied the rule of ejusdem generis to the language "trays, glasses, dishes, or other tableware," saying at page 188:

> " ... the article contemplated by the word 'tableware' must be deemed to be one which is, in general, of the same degree of permanency as that possessed by the other objects enumerated immediately before it in the statute. Under the facts of this case, it is beyond question that a mere paper napkin, which was intended to be discarded after one use, would not be an article of 'tableware' such as is contemplated by the statute here involved."

Therefore, under the staff's interpretation of Sections 6359(a) and (b), for tax to apply to the sale of food products, the retailer must provide "facilities" of a durable or of a permanent nature. The policy of not taxing food sales in which only disposable tableware was provided the buyers may have been necessitated by administrative considerations. It is arguable, however, whether such a narrow construction is required in all situations, especially in light of Hart's Drive-In Corporation v. State Board of Equalization, 145 Cal. App. 2d 657 (1956). In this case, the trial court determined that disposable paper trays were "trays" within the meaning of Section 6359 (b). In upholding the trial court, the appeals court rejected the retailer's argument that the statute required such items as trays, glasses, dishes, and other tableware to be of a permanent or reusable nature. The court held that there was no general rule of law defining a "tray" or "meal", but that such determinations were dependent upon the factual circumstances of each case.

Post 1972

Since 1972 the questions concerning the interpretation of such teems as "meals," "premises," "serving," or "facilities" have become irrelevant in regards to sales of "hot prepared food products." In 1972, the law was amended to provide that tax applies to all sales (unless otherwise exempted) of

hot prepared food products, whether or not they are sold on a "take-out" basis. (Formerly Section 6359(e), which is now 6359(f).) Consequently, the cited staff opinions have no relevance to the issues raised by the petitioners.

Therefore, the river rafting companies are retailers who sell hot prepared food products to their passengers. As provided under Section 6359(f) of the Revenue and Taxation Code, the exemption provided by Section 6359 does not apply.

STC Opinion 550.0640 has been deleted from BTLG (CLD 437, Sept. 1, 1981) because it did not take into account the 1972 statutory change to Section 6359. For the same reason, it is my recommendation that STC Opinions 550.1580 and 550.0100 should also be deleted from the BTLG since these staff opinions are likewise obsolete.

CJG:ba
Attachment

cc: Don Hennessy

Memorandum

To: Mr. W. E. Burkett
Mr. John H. Murray
Mr. Donald J. Hennessy
Ms. Susan M. Wengel

Date: November 29, 1982

From: Gary J. Jugum

Subject: Friday meeting REDACTED TEXT
Wednesday, November 10, 1982

On November 10, 1982, we met to discuss Ms. Susan M. Wengel's proposed hearing report in the matter of REDACTED TEXT concerning taxation or meals furnished during river rafting trips.

We reviewed application of tax in various instances where meals are furnished to consumers for a "package" or lump-sum price:

Wine tasting	- educational/informational
Scene railroad	- transportation
Political dinners	- educational/informational
Airlines	- transportation
River rafts	- transportation
Boarding houses (1603(a))	- lodging

Since food products for human consumption are non-taxable, the charge related to the labor of preparing and serving meals would escape taxation in its entirety if persons providing the packages described above were treated as consumers of food products and not retailers of meals.

First, Revenue and Taxation Code Section 6006 specifically provides that "sale" includes "the furnishing, preparing or serving for a consideration of food, meals, or drinks." Thus the plain language of the statute supports application of the tax.

Second, it appears that, with one exception to be discussed, the Board has consistently treated the situations listed above as situations involving taxable sales of meals. The person making the sale is permitted to make a reasonable allocation between the sale price of the meal and the "price" for the entertainment or transportation or lodging portion of the “package." Regulation 1603 specifically provides that "In the case of REDACTED TEXT hotels and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for meals or hot prepared food products."

Third, the approach which has been taken in the past is supported by a general contractual analysis. In the cases listed in which a segregation has been required, the purchaser can be said to have bargained for both the service aspect of the transaction as well as the meal provided. Indeed, in the case at hand, the river raft expeditions, it is clear that the meals are part of the inducement. The expeditions last up to three days, and persons making the trips are not permitted to bring their own food to prepare their own meals. Indeed, as many as nine meals may be prepared and served by petitioner to each participant. Meals in such quantities could hardly be characterized as incidental or insignificant. Further, it is our understanding that should a particular participant be unable to partake of the meals prepared by petitioner, for example, because of a medical condition such as diabetes, a credit would be granted against the lump-sum expedition price. That is, an adjustment would be made in the contract price.

The single exception referred to above is the situation where meals are furnished to airline passengers who are charged a single price. The Board has treated airlines as the consumers of the food products in these instances because historically airline transportation tariffs have been set under principles applicable to common carriers. The price established for air transportation is applicable whether or not the meal is consumed by the passenger. Thus, what is bargained for and sold is transportation, not necessarily transportation and a meal. The airline case may further be distinguished from the river rafting case based upon the relative insignificance of a single meal served upon an airline in contrast to the multiple meals furnished by petitioner to each participant in the river rafting expedition.

j:alicetilton

cc: Mr. Robert H. Anderson
Mr. James E. Mahler