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November 15, 1993

Re: Ex-tax Dinners for Government Contractor

Dear REDACTED TEXT:

This is in response to your letter wherein you requested advice and information as to whether a government contractor may purchase dinners ex-tax. We apologize for the delay in responding.

The issue which arises is whether your restaurant may accept a resale certificate in good faith from a government contractor given that you realize your dinners are not generally purchased for resale. Sales and Use tax Regulation 1668, Resale Certificates, provides at subdivision (d):

"A seller will be presumed to have taken a resale certificate in good faith in the absence of evidence to the contrary. If the purchaser insists that the purchaser is buying for resale property of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific property is being purchased for resale in the regular course of business."

Clearly, the government contractor does not regularly sell your dinners, therefore, a presumption arises that the contractor is not reselling the dinners prior to using them but is using the property in performing the government contract.

The discussion in Aerospace Corp. v. State Bd. of Equalization (1990) 218 Cal.App.3d 1300 is relevant to the issue of government contractor's treatment of indirect costs pursuant to its contract with the federal government. The Aerospace court held that for sales and use tax law purposes "title to property used in the performance of federal contracts passes to the government in accordance with the terms of the title clauses of such contracts." (Id. at 1313, 1314).

As a result of the Aerospace decision, a government contractor may treat indirect costs, such as overhead expenses, properly allocable to its government contracts as purchases for resale to the United States which are exempt from sales tax if the government contract involved contains title-passage clauses included in Federal Acquisition Regulations (FAR).

In order for you to sell dinners to the government contractor ex-tax, you must require that the contractor issue a valid and timely resale certificate which includes a statement that the

specific property is being purchased for resale to the federal government, pursuant to the contract and in the regular course of business. If you accept such a resale certificate in good faith, you are relieved from the liability for sales tax on the sale and the obligation to collect use tax.

We hope the above discussion has answered your questions. Enclosed for your information is a copy of Sales and Use Tax Regulation 1668, Resale Certificates.

Our intention is to provide helpful responses to inquiries such as yours. If you need anything further, please do not hesitate to write again.

Sincerely,

Carl J. Bessent
Staff Counsel

CJB/md

cc: San Jose District Administrator