STATE OF CALIFORNIA

BOARD OF EQUALIZATION **590.0370**

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim for Refund Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
F--- CORPORATION	)	No. SS -- XX-XXXXXX-0010
Petitioner	)	

The above-referenced matter came on regularly for conference before Staff Counsel Janet Saunders on November 14, 1990 in Santa Ana, California.

Appearing for Claimant:

R--- B. D---
Attorney at Law

L--- E---
Vice President

Appearing for the Sales and Use Tax Department:

Scott Gray
Senior Tax Auditor

Gerald Highland
Supervising Tax Auditor

Protested Item

The protested tax liability for the period April 1, 1985 to March 31, 1988 is in the amount of $52,566.35.

Parties' Contentions

Claimant contends that it has operated pursuant to a joint venture/partnership with schools in selling juice drinks and is thus exempt from tax pursuant to Sales and Use Tax Regulation 1574(b)(2)(D) pertaining to sales by school districts. The Sales and Use Tax Department (SUTD) (formerly the Department of Business Taxes) contends that the sales made by claimant were not sales by school districts and that therefore, the school exemption does not apply.

Summary

Claimant is a corporation engaged in the business of selling noncarbonated fruit juice drinks through vending machines located on public, private and parochial school premises. Claimant filed its sales and use tax returns, paid taxes and now seeks a refund.

Claimant owns and operates juice drink vending machines; the machines require a hookup to water and electricity and are fully automated. Claimant's staff regularly repairs, services and stocks the machines and collects the coins. The proceeds are divided between claimant and the school at which the machines are located; claimant receives 80 percent of gross receipts and the school receives 20 percent. A sample agreement between claimant and a school is attached hereto as Exhibit A. Claimant self-insures its machines (which have little if any market value) and bears any loss that may occur.

Claimant contends that its agreement with the various school districts creates a partnership and therefore, the drink sales at issue are food sales by school districts.

Claimant's operations prior to this audit period involved machines that were not automated; during this prior period, school students and/or school employees played a greater part in dispensing the drinks. Also, there was a different profit-sharing plan wherein the schools bore the risk of drinks ruined or not sold. This system did not work well and an automated procedure was put into place.

Claimant submitted a written inquiry to SUTD in February 1, 1988 asking:

> "Would the sales of <u>non</u>-carbonated cold beverages (fruit juices, fruit-flavored beverages) through vending machines by and/or for student organizations of public, private and parochial schools be considered a taxable item?" (Emphasis in original.)

The SUTD's response on February 29, 1988 stated:

> "This is in answer to your letter dated February 1, 1988…. I am assuming that you mean that the vending machines are on school campuses and the sales are being made by student organizations to the students of the school.
> "Regulation 1602(a)(2) defines non-carbonated fruit juices and fruit-flavored beverages as exempt food products. Regulation 1574(b)(2) (copy attached) states' in part that 'tax does not apply to sales of any food products, whether sold through a vending machine or otherwise, to students of a school by public or private schools, school districts, or student organizations….'"

The SUTD wrote to claimant again on June 8, 1988 to clarify the letter of February 29, 1988. That letter stated in pertinent part:

> "In light of the information provided since we responded to your original letter dated February 1, 1988, we now are of the opinion that the student organization to which you refer are not making sales of your product to students. Your company is the retailer of the product sold and tax applies to your gross receipts .... We base our decision on the following factors:
>
> "1. The product and machines belong to F--- Corporation.
>
> "2. F--- Corporation does all maintenance and servicing of the machines (this being too complicated for the students and/or school districts.)
>
> "3. The school essentially does nothing other than to allow the vending machine to be placed on the campus and receive a monthly commission check."

Analysis and Recommendations

Tax is imposed on sellers of tangible personal property as measured by gross receipts. Revenue and Taxation Code section 6051. For the purpose of the proper administration of the sales and use tax law and to prevent evasion of the sales tax law, it shall be presumed that all gross receipts are subject to the tax until the contrary is established. Revenue and Taxation Code section 6091. Sales and Use Tax Regulation 1574 (b)(2) is specific to vending machine food sales and provides that such sales are generally taxable.

Claimant claims to be exempt from tax pursuant to Revenue and Taxation Code section 6363 and Sales and Use Tax Regulation 1574(b)(2)(D). A party claiming a tax exemption has the burden of showing that he comes clearly within the terms of the exemption statute. (Standard oil Company of California v. State Board of Equalization, (1974) 39 C.A. 3d. 765; 114 Cal.Rptr. 571.) Section 6363 provides in pertinent part:

> "There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to the students of a school by public or private schools, school districts, student organizations, parent-teacher associations, ... operating a restaurant or vending stand in an educational institution ... ."

Regulation 1574(b)(2)(D) contains similar language. Thus, the legal question presented herein is this: did the agreement between claimant and the school districts constitute a partnership or joint venture such that the vending machine sales to students should be considered sales by school districts? It is claimant's contention that it entered into a partnership with the various school districts and is thus entitled to the school exemption.

A partnership is defined in Corporations Code section 15006 as an association of two or more persons to carryon as co-owners a business for profit. Corporations Code section 15007 provides in pertinent part:

"In determining whether a partnership exists, these rules shall apply:

* * * *

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

* * * *

(b) As wages of an employee or rent to a landlord. …"

Based on these statutes, it appears that claimant did not enter into a partnership with the school districts or other school associations. There was no co-ownership of a business. The sharing of gross receipts did not indicate a common interest in the property; the sharing of gross receipts in this case is more accurately characterized as a payment for the use of space and utilities, i.e., rent calculated on a percentage basis. Further, other than the division of gross receipts, claimant and the school districts did not share any other legal elements of a partnership. Claimant owned the machines and was responsible for their maintenance; any machine breakage or other loss was borne fully by claimant (except that the school districts' profit share would be less.) Claimant was responsible for its own insurance. The school district had minimal contact with claimant regarding the business and virtually no input as to how the business should be operated. There being no partnership or joint venture, the exemption set forth by Revenue and Taxation Code section 6363 does not apply.

If an argument is made that the SUTD's letter of February 29, 1988 is inconsistent with this analysis, that argument is incorrect. The letter clearly states its assumption "that the vending machines are on school campuses and the sales are being made by student organizations to the students of the school. (Emphasis added.) Claimant's previous mode of operation called for more vending operations to be conducted by students; the mode of operation for the audit period at issue was for minimal school participation.

Recommendation

The exemption set forth in Revenue and Taxation Code section 6363 and Sales and Use Tax Regulation 1574(b) (2) (0) does not apply. The claim for refund should be denied.

Janet Saunders, Staff Counsel — September 19, 1991 (Date)