

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

In the Matter of the petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
)	
<u>Petitioner</u>)	

The above-entitled matter came on regularly for hearing on November 28, 1983 in Downey, California before Stephen A. Ryan, Hearing Officer.

Appearing for Petitioner: None

Appearing for the	
Sales and Use Tax Department:	Mr. Robert Sayles Supervising Tax Auditor
	Ms. Cynthia A. Savala Tax Auditor

Protested Item

The petitioners have filed a petition for redetermination of a tax deficiency determination issued on April 1, 1983, for the period January 1, 1979 through December 31, 1981. The protest involves tax determined on the following audit item:

A.	Taxable sales understated based on tests for sales of hot prepared fish, soda, beer and wine	\$1,172,502
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A 10 percent penalty was imposed for negligence.

Petitioners' Contentions

1. The assessed deficiency includes receipts from sales of exempt food for human consumption pursuant to section 6359 of the Revenue and Taxation Code, including specifically the "you buy, we fry" sales of cold fish.

2. Petitioners' failure to collect taxes required to be collected was due to the advice, counsel and instruction from the Board's agents and employees.

Summary

Petitioners are engaged in business as a fish market with sales of beer, wine, soda, hot food and fresh fish. There was a prior audit through September 30, 1977.

Petitioners had two locations operating within the audit period – REDACTED TEXT.

The REDACTED TEXT location was very small with only enough room for people to stand (or sit on a few chairs) while ordering or waiting for an order. Although there were public trash cans on a plaza-type area outside the business, no place was provided for customers to sit and eat the food purchased. During the auditor's observation of the premises, she did not see anyone eating inside the business location. The food was thus sold on a "take out" basis wrapped and placed in paper bags.

The REDACTED TEXT location was larger and contained several tables so that customers could eat the food on the premises. Petitioners did not, however, segregate their receipts or in any other manner distinguish its sales to customers who ate the food on the premises from those who did not.

As part of their fish market operations, petitioners made sales of fish under the name "you buy, we fry". The customer would identify a fish filet on display. Petitioners' employee would pick it out and fry it. The employee would then hand deliver the fried fish to the customer. The customer would be given one sales receipt indicating a separate charge for the cold fish and another separate charge for the frying.

Petitioners maintained a schedule of frying charges and menus which included separate price lists for the cold fish.

The auditor discovered that petitioners were reporting as exempt its sales of fish in a "you buy, we fry" arrangement as well as soda, beer and wine. All receipts (actual and as estimated) from these sales were treated by the auditor as taxable. The sales of fish were subjected to the tax on the basis that it represented a hot prepared item.

The auditor concluded that petitioners maintained inadequate records for sales and use tax purposes. No sales or purchase journals were kept. Federal income tax returns were provided for two years.

The audit determined that the total sales reported were not acceptable for the reason that the mark-up percentages reflected were approximately 14 and 12 for the years 1979 and 1980, respectively.

The audit staff observed sales made at the REDACTED TEXT location for a one week period and made a breakdown of the type of sales based on this actual test. A purchase schedule was prepared using three months of the invoices on hand. The auditors also had 1980 invoices which were tested and segregated. The auditor then determined the percentage of purchases attributable to fish and computed a weighted markup for fish giving effect to the separate categories of hot fish sold. A separate mark-up computation was made for beer, wine and soda and applied to compute sales in these categories. A comparison of audited and reported amounts

resulted in the audit deficiency. Approximately 37.7% of the fish sales were audited as exempt sales of cold fish.

Petitioners' attorney, REDACTED TEXT contacted the hearing officer on the morning of the preliminary hearing regarding a continuance. It was decided that the partners would appear at the hearing without their attorney. However, the attorney's secretary called the hearing officer five minutes before the hearing to say that no appearance would be made. The hearing officer gave petitioners' attorney three weeks to submit additional evidence and legal briefs but nothing was submitted.

No details were submitted about the alleged incorrect advice given by Board employees.

Analysis and Conclusion

It is concluded that no adjustment is warranted due to the claim by petitioners of incorrect advice. It is the finding of the hearing officer that satisfactory evidence of any incorrect advice was not submitted. In any event, the Board cannot grant relief due to estoppel anyway (see Market St. Rv. Co. v. Cal. St. Bd. of Equal. (1955) 137 Cal.App.2d 87; 290 p.2d 20).

The remaining issue is whether any of the deficiency measure constituted gross receipts from the sale of "food products for human consumption" which would be exempt from sales tax pursuant to Revenue and Taxation Code section 6359.

Regulation 1602(a) (2) [Cal. Admin. Code, title 18, section 1601], states that "food products" do not include "carbonated waters, spirituous, malt or vinous liquors, or carbonated beverages".

Therefore, the charges for the soda, beer and wine are taxable since these do not constitute exempt food products for human consumption within the meaning of the statute or regulation.

"Food products" are defined in section 6359 to include fish and fish products. This section provides, however, that the exemption does not apply in the following situation:

"(f) when the food products sold are sold as hot prepared food products. 'Hot prepared food products,' for the purposes of subdivision (f), include a combination of hot and cold food items or components where a single price has been established to the combination, such as a hot meal, a hot specialty dish or serving, or a hot sandwich or a hot pizza, including any cold components or side items. Subdivision (f) shall not apply to a sale for a separate price of bakery goods or beverages (other than bouillon, consommé, or soup), or where the food product is purchased cold or frozen; 'hot prepared food products' means 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."

Regulation 1603(d)(1), which was enacted by the Board to implement this section, provides:

“On and after January 1, 1972, tax applies to all sales of hot prepared food products unless otherwise exempt. ‘Hot prepared food products’ means 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 mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot 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. When a single price has been established for a combination of hot and cold food items, such as a meal or dinner, which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot or cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), or (e) of this regulation, or in regulation 1574, tax does not apply to the sale for a separate price of bakery goods and hot beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), or (e) of this regulation. Tax does not apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consommé is considered a hot prepared food product, not a beverage.

If the “you buy, we fry” sales are found to be sales of hot prepared food products, petitioner’s sales would not be exempt.

In applying subsection (f), we must initially determine when the "sale" of the fish occurred. Revenue and Taxation Code Section 6006 defines "sale" to mean:

"(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

* * *

(d) The furnishing, preparing, or serving for a consideration of food, meals, or drinks."

Conversely, Section 6010 defines "purchase" as follows:

- "(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. 'Transfer of possession,' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter."

Pursuant to Uniform Commercial Code-Sales, section 2401(2) and Regulation 1628(b)(3)(D), the sale occurs (i.e., title passes to the purchaser) when the retailer physically delivers the property to the purchaser unless the parties had an explicit agreement to pass title at an earlier time. Accordingly, since no explicit agreements have been shown to exist, petitioners sold each "you buy, we fry" fish item to their customers at the time they or their employees hand delivered it to them.

Following the statutory definition of hot prepared food products, each fish was prepared for sale in a heated condition and sold at a temperature higher than Long Beach location room air temperature. These conclusions are reached because the fish was hot rather than cold at the time of the "sale" and "purchase". Further, for the same reasoning, although a separate price was charged for the frying, the fish was not "purchased cold".

In summary, the essence of the "you buy, we fry" transaction is one combined transaction—a sale of a hot prepared food product. The only reason for the argument of petitioner is to avoid the application of sales tax and this is not sufficient evidence of any independent business reasons to treat it as two separate transactions. Accordingly, as a sale of hot prepared food products, pursuant to section 6359(f), no exemption exists for the REDACTED TEXT sales of "you buy, we fry" fish.

The auditor's tests and projections are quite detailed and appear to be based upon the best available information. In the absence of evidence to show that the test results are incorrect, we approve of the audit procedure.

Recommendation

It is recommended that the deficiency determination be redetermined without adjustment.

Stephen A. Ryan, Hearing Officer

2-27-84
Date