

SUMMARY

Petitioners own and operate a donut shop. There has been no prior audit.

Several hundred customers purchase donuts at the shop each day. Some customers come inside the shop, while others walk or drive up to a “take out” window. There are two such windows, one on each side of the shop.

About 70 percent of petitioners’ sales are on a “to go” basis. The remainder are to customers who desire to eat their donuts inside the shop. For the convenience of these customers, the shop has a u-shaped counter with sixteen stools.

The shop is located on a lot which has parking spaces for fifteen cars. Seven trash receptacles are situated near the parking spaces.

At least two or three employees are present whenever the shop is open.

The audit concluded that the shop is a “drive-in”, similar to a McDonald’s or Jack-in-the-Box, and that all sales through the “take out” windows (except bulk sales) are therefore subject to tax. The basis for this conclusion was a determination that parking spaces are provided primarily for use by customers in consuming donuts purchased through the windows. The fact that trash receptacles are situated near the parking spaces was viewed as evidence supporting this determination.

ANALYSIS AND CONCLUSIONS

In relevant part, subdivision (b) of Regulation 1603 provides:

“DRIVE-INS.” Tax applies to sales of drinks or food ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the “drive-in” establishment. . . .

At the preliminary hearing, petitioners offered photographs, testimony and other evidence which establishes that the parking spaces were intended primarily for use by customers eating inside the shop and by employees, and only secondarily for customers who wish to eat in their cars. Accordingly, the shop is not a “drive-in” within the meaning of Regulation 1603, subdivision (b).

RECOMMENDATION

It is recommended that the petition be granted.

JAMES E. MAHLER, HEARING OFFICER

5/23/78
Date