550.0818

Memorandum

To: Ms. Joan Armenta-Roberts
Audit Evaluation and Planning (MIC:40)

Date: September 2, 1994

From: John L. Waid
Tax Counsel

Subject: Annotation Section 550.0000

Attached for annotation consideration please find a copy of my memorandum to Mr. Morris Verna, dated March 16, 1994, on the taxation of caterers who supply food on returnable trays. I suggest the following annotations:

For Sub-section (e):

"Where the caterer merely provides cold food on a large returnable tray in a bulk amount, even though the food has been previously prepared to be eaten in individual servings, as in a tray of sandwiches, it is considered that, although the tray is a 'facility of the retailer,' under Regulation 1603(f), the food is not furnished in a form suitable for consumption from that facility. Where the tray is brought in and deposited at the customer's premises with no further participation on the part the caterer's employees, there is no 'service' within the meaning of Regulation 1603(h). Such sales are sales of cold food products with the result that they are exempt from tax."

JLW:es

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Memorandum

To: Mr. Morris Verna, Jr.
BH – District Auditing

Date: March 16, 1993

From: John L. Waid
Tax Counsel

Subject: REDACTED TEXT
Taxation of Caterers

I am responding to your memorandum to Assistant Chief Counsel Gary J. Jugum dated November 2, 1993. You indicated that there was an apparent conflict between a memorandum of Senior Staff Counsel Mary C. Armstrong dated July 28, 1981, to REDACTED TEXT, and a letter of mine dated April 8, 1992, to REDACTED TEXT over the issue of whether sales of cold food to-go, provided on bulk trays/platters, without any serving involved, was subject to tax. You attached to your memorandum copies of both of these missives plus a memorandum of mine dated December 16, 1991, to the San Francisco District Principal Auditor regarding this same taxpayer.

You indicated that the audit of this taxpayer was completed on the basis of my opinion. You had, however discussed this apparent conflict over the phone with Mr. Jugum whom you indicate said it was your choice. You spoke at a Bay Area Caterer's Association Meeting in which you expressed your view that such transactions were exempt from tax. A representative from this taxpayer was there who requested your advice as to whether to pursue the findings of this audit. You hesitated to discourage her; as a result, this taxpayer has filed a claim for refund.

You state your position as follows:

> "There is an inconsistency regarding cold food to-go, provided on bulk trays/platters, without any serving involved. Mary considered such activity exempt, John considers it taxable, I support Mary's position on this. It has been the interpretation I have followed for years. I have never considered trays or platters, which contain bulk food to constitute taxable facilities. The terms tables, chairs and counters imply places for individual seating/consumption. Glasses, dishes and other tableware also imply items for individual usage. Likewise, I believe 'trays' (or 'platters') also are meant to pertain to items for an individual's use. There would be small carrying trays/platters containing food items for an individual, not large trays/platters containing bulk quantities of food for multiple individuals."

OPINION

Regulation 1603(f) provides as follows:

> "Tax applies to sales of ... foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others."

Regulation 1603(h) provides as follows:

> "Tax applies to the entire charges made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers ...."

I did not have in my files a copy of Mrs. Armstrong's letter which I have now reviewed. Often times our research does not disclose that anything has been written on a particular topic, so we conclude that we are writing on a clean slate when dealing with a particular topic.

There are two separate principles operating here. Regulation 1603(f), quoted above, governs sales of food in a form suitable for consumption at facilities of the retailer. Regulation 1603(h) covers caterers, who serve food on the premises of the customer. The two generally cover similar but separate operations, but they overlap when the retailer brings food products or meals to the premises in returnable containers.

As you note, the regulation does not define tables, chairs, counters, trays, glasses, dishes or tableware. My research indicates, however, that it has never been the opinion of the Legal Division that these terms apply only to containers of individual servings. (See, e.g., Annot. 550.0180.) You will recall that one of the issues in Treasure Island Catering Company v. State Board of Equalization (1941) 19 Cal.2d 181 was whether the ledges around the taxpayer's concessions which were provided by fair officials for the general use of the fairgoers could be considered "counters" under the predecessor tax ruling to Regulation 1603(f). The court determined that the ledges at issue therein were not intended for use in serving food to the concessionaire's customers. It is clear, however, that a counter intended and usable for serving food is a "facility" within the meaning of the regulation whether it serves 1 or 100.

Mrs. Armstrong's memorandum is not inconsistent with this opinion. The sandwich makings at issue therein were not sold in a form suitable for consumption from the facilities of the retailer. The workers there combined the makings into sandwiches and ate them at their workbenches. As revealed in my memorandum of December 16 on this taxpayer, it was selling pre-cooked (though cold at the time of serving) meals in returnable containers presumably at a location chosen by the customer for eating purposes.

The staff has recently met and discussed this issue. Although the question is certainly not free from doubt, it was decided that where the caterer is merely providing food on a large returnable tray in a bulk amount, even though it has been previously prepared to be eaten in individual servings, as

in a tray of sandwiches, it would be considered that, although the tray is "facilities of the retailer" under Regulation 1603(f), the food is not furnished in a form suitable for consumption. This rule applies only where the tray is brought in and laid down with no further participation on the part of the caterer's employees. Where, however, the caterer's employees divide the food into individual servings, such as putting the sandwiches on individual plates, that is "service" under Regulation 1603(h), rendering the caterer's entire charge subject to tax. Where each individual serving is supplied in its own returnable container and is intended to be eaten from the container, the caterer's charge is fully subject to tax.

I am sending a copy of this memorandum to Audit Review and Refunds for their action.

JLW:es

cc: Mr. Michael P. Kitchen, Audit Rev. & Ref. (MIC:39)