



STATE BOARD OF EQUALIZATION

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January 25, 1993

Ms. REDACTED TEXT
COMPANY A

Re: REDACTED TEXT
COMPANY A
Sales of Meals to INSTITUTION

Dear Ms. REDACTED TEXT:

I am answering your letter to me of November 30, 1992. You asked about the application of sales tax to your company's sales of meals and food products to educational institutions.

In your letter you indicate that your company, COMPANY A, contracts with various hospitals, businesses, and schools to operate their food service facilities. Each contract varies regarding the specific services provided. Your client at INSTITUTION advised you that meals sold to students are exempt in California. You contacted Ms. Pat Parker of our Audit Evaluation and Planning Section, who referred you to me.

Ms. Parker suggested you send a copy of the contract. You enclosed with your letter a copy of an "Agreement for Food Services" ("Agreement") dated March 21, 1986, between the INSTITUTION and COMPANY B. You also enclosed a letter dated July 7, 1988, confirming a meeting between those entities at which the Agreement was modified. We assume that COMPANY A is a successor or assign of COMPANY B and that these two documents accurately reflect the rights and duties of INSTITUTION and COMPANY A. We also assume that the INSTITUTION is a "school" for the purposes of our discussion.

I. FACTUAL BACKGROUND

Section 1 grants to COMPANY A the right to operate, within designated portions of the INSTITUTION, to operate food, beverage, dining, catering, conference room, coffee services, and vending machines and to procure, prepare, and serve therein food and beverage items. COMPANY A will supply all of the equipment reasonably necessary, in the INSTITUTION's opinion, to accomplish these services. (§ 2.) The INSTITUTION sets the hours of operation, and the food or merchandise sold is negotiated between COMPANY A and the INSTITUTION. (§ 6.) COMPANY A employs, trains and maintains the employees used to provide the contracted-for services. (§ 7(b).) COMPANY A supplies all necessary food, merchandise, supplies, and kitchenware. (§ 7(d).)

The INSTITUTION pays COMPANY A a management fee. The amount is set forth in the Agreement (§ 13), but was increased in the July 1988 letter. COMPANY A's gross sales is

defined as "the total cash and charge receipts from sales" it makes on the premises. The term does not include applicable sales taxes or tips and gratuities to COMPANY A's employees, nor commissions or other amounts paid to COMPANY A by vending machine operators or concessionaires. (§ 14.) Upon the monthly account settlement (See, § 12), COMPANY A agrees to turn over to the INSTITUTION any amount by which its gross sales exceed its costs of business. If the gross sales do not equal its costs, the INSTITUTION shall reimburse COMPANY A for the shortfall in addition to the management fee. (§ 15.) COMPANY A apparently has the right to determine what it will charge the customers, within limits set out in the Agreement. (§ 11(b).)

II. OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." "Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.2d 201].) The taxpayer has the burden of showing that he clearly comes within the exemption." "Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Sales of Meals to Students.

Section 6363, interpreted and implemented by Sales and Use Tax Regulation 1603(j)(2), provides an exemption for sales of meals to student as follows:

"Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations, are exempt from tax, except [when sold within a place the entrance to which is subject to an admissions charge]."

In this situation, we have long held that when the food is actually supplied to the students by an outside entity, such as a caterer, the outside entity must first sell the meals to the institution which must resell them to the students. The latter sale is the exempt sale. The institution must independently contract with such entity for the purchase of the meals and with the students to sell the meals. If the outside entity sells the meals directly to the students, such sales are not sales by the school and so do not fall within the above exemption. (Annot. 550.1180. Sales and Use Tax Annotations are excerpts from previous Legal staff opinion letters and serve as a guide to staff positions.) The fact that the students pay the caterer for their meals on an "as-you-go" basis is an indication that the caterer is selling the meals directly to the students.

C. Tax Consequences to COMPANY A.

Here, "gross sales" are defined in Section 14 as COMPANY A's total cash and receipts from its sales. In addition Section 11 grants COMPANY A the ability to set prices. We thus conclude that COMPANY A and not the INSTITUTION is selling the meals to the students. The exemption for sales of student meals applies only if the school sells the meals. COMPANY A's sales of meals to the students at the INSTITUTION are thus subject to tax.

For your information, I have included a copy of Regulation 1603. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es
Enclosure: Reg. 1603
bc: Out-of-State District Administrator