STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
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November 13, 2001

Re: REDACTED TEXT
Request for Advice; Account REDACTED TEXT

Dear REDACTED TEXT,

This responds to your letter dated September 5, 2001 to Assistant Chief Counsel Janice Thurston of the State Board of Equalization, requesting advice as to how sales tax applies to bundled meals sold by REDACTED TEXT. You letter has been assigned to me for reply.

You explain:

> "The attached Decision and Recommendation [regarding Account REDACTED TEXT] has come to my attention. The Decisions and Recommendation seems to contradict what REDACTED TEXT restaurants in this area have been doing with respect to the collection of sales tax on bundled meals. BOE Pamphlet No. 22 states that an entire bundled meal is taxable if it contains a carbonated beverage. The Decision and Recommendation states that the meal is subject to tax measured only by the sales price of the beverage.
>
> "Could you please furnish us written advice with regard to the sales tax to be collected on bundled meals, with and without a carbonated beverage?"

The Decisions and Recommendation attached to your letter address a specific factual situation – sales of "value meals," which included a cold sandwich and a cold beverage, and sold on a "to go" basis.

Before addressing your specific questions, a general discussion about the taxability of charges for food products and edible non-food products may be helpful. Gross receipts from the sale of food products for human consumption ("food products") are generally exempt. (See Rev. & Tax. Code § 6359(a); Reg. 1602(a).) Subdivision (b) of section 6359 and subdivision (a) of Regulation 1602 identify many products whose sales fall within the exemption for food products. Of significance for this opinion are gross receipts from sales of carbonated beverages, which are expressly excluded from the definition of "food products." (See Rev. & Tax. Code § 6359(b)(3); Reg. 1602(a)(2).)

There are also several exceptions to the general rule that gross receipts from sales of food products are exempt. Potentially relevant to your letter is the exception for food products served as meals on or off the premises of the retailer, provided by subdivision (d)(1) of section 6359. (See also Reg. 1603(a)(2)(A).) Concluding that tax applies to these charges requires determination that the combination of products constitutes a meal, and that the meal is being served. These concepts will be discussed below.

Other exceptions include the sale of hot prepared food products (Rev. & Tax. Code §§ 6359 (d)(7) and 6359(e); Reg. 1603(e)), and the "80-80" rule (Rev. & Tax. Code § 6359(d)(6); Reg. 1603(c)). Your letter and the Decisions and Recommendation indicate that neither of these exceptions applies to the questioned transactions.

Another exception is when food products are furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes or other tableware, provided by the retailer. (See Rev. & Tax. Code § 6359(d)(2); Reg. 1603(f).) Charges for these items are subject to tax. These items do not need to constitute meals to be taxable, nor must they be served – they will be taxable if they are furnished, prepared, or served. However, since the Decision and Recommendation and your letter are limited to sales on a "to go" basis, this exception will not apply.

Another exception to the general rule that gross receipts from sales of food products are not taxable is the "drive-in" rule. Subdivision (d)(3) of section 6359 provides, and subdivision (b) of Regulation 1603 explains, that receipts from the sales of food products are taxable when the food products are ordinarily sold for immediate consumption on or near parking facilities provided primarily for patrons consuming the products which are sold on a "to go" or "take out" basis. These items do not need to constitute meals for their sales to be taxable, nor must they be served. I assume that the REDACTED TEXT restaurants have no parking facilities provided primarily for patrons to consume the food products purchased on a "to go" basis, so that neither subdivision (d)(3) of section 6359 nor subdivision (b) of Regulation 1603 will apply.

It is my opinion that these transactions do not involve the *service* of a meal. As the California Supreme Court has explained, "The generally accepted concept of a meal is that it not only consists of a larger quantity of food than that which ordinarily comprises a single sandwich, but that it usually consists of a diversified selection of foods which would not be susceptible of consumption in the absence of at least some articles of tableware and which could not conveniently be consumed while one was standing or walking about." (*Treasure Island Catering Co*. v. *State Board of Equalization* (1941) 19 C.2d 181, 186.)

The sale of a sandwich with a beverage involves the sale of a meal. As discussed above, however, the sale of a meal will be taxable only if the meal is served. Given that the bundled meal is taken by the purchaser for consumption at a location other than the seller's premises, it does not appear that the meal is "served" within the meaning of subdivision (d)(1) of section 6359 or subdivision (a)(2)(A) of Regulation 1603. Placing a sandwich and beverage in a sack, and handing the sack to the purchaser, does not constitute "serving" the meal.[1]

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[1] In Annotation 550.0062 (12/6/83), we concluded that a caterer is not serving meals when it delivers cold food to the taxpayer's location, unpacks that food from boxes, and places the cold food together on a side table for the customer's consumption. Merely handing a customer a sack containing a meal as in the facts of your letters appears to be even further removed from the activity contemplated in the annotation.

Since we have concluded that the sale of the sandwich package does not constitute a served meal, the status of the food products as meals has no real significance. As a result, we are instead dealing with some food products whose sales are exempt from tax (sandwiches), which are sold for a single price with edible non-food products whose sales would be subject to tax if sold separately (carbonated beverages). Tax does not apply to the portion of the charge representing the food product because it is not a served meal. The only issue remaining is how tax applies to that portion of the charge representing the carbonated beverage which would be taxable if sold alone, when it is sold with the exempt food product for a combined charge.

Tax applies to sales of carbonated beverages, because they are excluded from the definition of exempt food products. (See Rev. & Tax. Code § 6359(b)(3); Reg. 1602(a)(2).) Tax applies to such sales whether or not the carbonated beverage is sold on a stand-alone basis or as part of packing consisting of both taxable and nontaxable tangible personal property. The portion of the combined charge allocated to the carbonated beverage is subject to sales tax.

When a bundled meal is sold with a non-carbonated beverage, or with no beverage, charges for such sales are exempt from tax, assuming there is no other non-food product in the bundled meal.

The Board is in the process of revising Pamphlet 22 to be consistent with the opinion set forth herein. I hope this letter answers your questions. If you need further assistance, please write again.

Sincerely,

Jeffrey H. Graybill
Senior Tax Counsel

JHG:bb

cc: San Diego District Administrator (FH)