# 590.0048

**State of California** **Board of Equalization**

# M e m o r a n d u m

To: San Jose – District Principal Auditor Date: March 30, 1984

From: Charles J. Graziano

Subject: REDACTED TEXT

This is in reply to your memorandum of February 7, 1984, with regard to the above-referenced taxpayer. This taxpayer has filed a claim for refund for overpayment of sales taxes reported on vending machine sales of cold food products commencing August 1, 1983. The basis for this claim for refund is that the taxpayer considers the sales in question to have been made under an obligation to sell for a fixed price contract pursuant to a contract entered into prior to July 21, 1983. You have included for our review copies of typical contracts and ask whether these vending machine contracts qualify as "fixed price" contracts, as that term is used under Section 36.5 of AB 399, Ch. 1102, Stats. 1983. It is your opinion that the taxpayer is not entitled to a refund principally because the taxpayer raised vending machine prices on sales of cold food products a minimum of five cents per item on 38 out of 40 contracts with industrial firms. Additionally, you point out that even if the contracts qualify as fixed price contracts under AB 399, there is a problem with refunding excess tax reimbursement in taxpayer's situation, since there is no way for the taxpayer to reimburse individual vending machine customers.

Effective August 1, 1983, tax applies to the gross receipts from the taxpayer's retail sale of tangible personal property through vending machines, regardless of the price charged for such items. However, as provided by the Legislative under Section 36.5 of AB 399, a vending machine operator can report and pay sales taxes after August 1, 1983 to the same extent and under the same conditions as was required under Sales and Use Tax Law on July 20, 1983, if certain conditions are met.

Prior to August 1, 1983, Section 6359.2 of the Revenue and Taxation Code provided that the tax imposed by Section 6051 of the Revenue and Taxation Code applied to 33 percent of the gross receipts of any vending machine operator from the sale at retail of "food products," as that term was defined under Section 6359 (other than hot prepared food products), when such food products were actually sold through a vending machine. Section 6359.2 was repealed in 1983 by AB 223, Chapter 323, effective August 1, 1983. By operation of Section 36.5 of AB 399, however, the partial exemption previously provided under Section 6359.2 is currently available (until December 31, 1986) to vending machine operators who sell cold food products through vending machines after

August 1, 1983, under the following conditions: (i) the vending machine operator is obligated to sell food products through vending machines for a "fixed price" pursuant to a contract entered into prior to July 21, 1983, or to a contract entered into pursuant to a firm bid submitted prior to July 21, 1983; (ii) neither part to the contract has the unconditional right to terminate the contract on notice, whether or not that right is exercised; and (iii) the price of the items sold is not increased after July 21, 1983.

The typical arrangement between the taxpayer and its customers is that the taxpayer is granted a right to place vending machines on the customer's premises and to sell tangible personal property, including various sundry items as well as hot and cold food products, through such vending machines. The pertinent terms of taxpayer's contracts provide that the taxpayer shall establish the price charged for the tangible personal property sold through the vending machines with the consent of its client, and that any increase in the retail sales price charged for such tangible personal property is subject to the mutual agreement of the parties to the contract. The contracts, however, do not specifically state the mutually agreed upon sales prices.

Although the contract does not specifically state the sale price for the tangible personal property sold pursuant to the agreement, it is our opinion that the taxpayer is nevertheless obligated to sell food products through a vending machine for a "fixed price" under the typical contract we examined. Since the agreement between the taxpayer and its customer provides that the price charged for the products sold through the vending machine, as well as any increase in this price, is o be determined by mutual agreement of the parties to the contract, it is our view that the prices were fixed under the contract at the amounts actually charged the buyers on July 20, 1983. Section 36.5, however, provides that the taxpayer ceases to be obligated under the fixed price contract whenever the price of any item sold under the contract is increased after July 20, 1983, or whenever the contract is renewed.

You state that the taxpayer raised vending machine prices on sales of cold food products a minimum of five cents per item on 38 of the 40 contracts. In our view, a refund is in order with respect to any excess tax paid on taxpayer's gross receipts from sales made under the two fixed price contracts in which the taxpayer did not raise sales prices. Prior Sales and Use Tax Law governs the application of tax to the taxpayer's gross receipts from vending machine sales of cold food products made under each of these contracts until either the sales price of any item sold through the vending machines covered under the contract is increased, the contract is renewed, or December 31, 1986, the date when Section 36.5 is repealed.

With regard to each of the remaining 38 fixed term contracts in which the taxpayer has already raised prices, the taxpayer may be entitled to a refund by operation of Section 36.5, provided the price increases occurred after August 1, 1983. The applicable refund for excess tax paid on sales made under each contract, however, would be limited only to sales made between August 1, 1983 and the time when the retail prices were actually increased.

With regard to the problem concerning excess tax reimbursement for sales of tangible personal property made through vending machines, it is our opinion that sales tax reimbursement is not charged by a vending machine operator unless the operator makes a representation to its customers that sales tax reimbursement is included in the sales price. Sales and Use Tax Regulation

1574 (a)(1) provides that sales will be regarded as having been made on a tax-included basis if a statement in substantially the following form is affixed to the vending machine:

> "All prices of taxable items include sales tax reimbursement computed to the nearest mill."

Therefore, unless this statement is affixed to taxpayer's vending machine during the period subject to the refund, the taxpayer has not charged the purchasers sales tax reimbursement, and is entitled to any applicable refund. However, if the sales in question have been made on a tax included basis, then pursuant to Section 6901.5 of the Revenue and Taxation Code, the taxpayer is not entitled to a refund for any excess tax reimbursement on its vending machine sales, unless the taxpayer is able to submit to the Board some plan which ensures that the buyers who were originally charges excess sales tax reimbursement will receive the amounts refunded by the Board.

CJG:jw