

Memorandum**590.0810**

To: Ms. Charlotte Paliani
Program Planning Manager Sec. (MIC:92)

Date: July 31, 2001

From: John L. Waid
Senior Tax Counsel

Subject: [No Seller's Permit]
Sales through Vending Machines where Tables and Chairs Are Provided

I am responding to your memorandum dated May 24, 2001 to Assistant Chief Counsel Janice L. Thurston on this topic. You ask if sales of food products through vending machines that are located in places where eating facilities are provided should be taxed as sales of food products under Regulation 1603(f), in which case 100 percent of the sales would be subject to tax, or sales of food products through vending machines under Regulation 1574, in which case only 33 percent of the sales would be subject to tax. You attached several documents to your memorandum, including a memorandum dated July 20, 2000, from Sales and Use Tax Department Deputy Director Ramon J. Hirsig to Ventura District Administrator Michael L. Webber regarding REDACTED TEXT. In that document, Mr. Hirsig advised Mr. Webber that the staff had previously taken the position that sales of cold food products through vending machines located in facilities where tables and chairs were provided for the consumption of the food products sold should be treated under 1574 rather than 1603. He cited to a "Notice to Vending Machine Operators," dated December 1987 (which he indicated was mailed out to industry in April of 1988) and obsolete Operations Memorandum No. 909, both of which contained this policy statement. A copy of the Notice was attached to your memorandum, but a copy of Operations Memorandum 909 was not.

You also attached to your memorandum a copy of an e-mail string in which I expressed, in an e-mail dated February 22, 2001, my preliminary opinion that 1603 controlled over 1574. I have now had an opportunity to study the matter further and conclude that, although the matter is not free from doubt, the policy expressed in Mr. Hirsig's letter is correct.

We agree that the policy, as stated in Mr. Hirsig's memorandum, has certain policy advantages. It is likely that a considerable portion of the food sales from vending machines located in break rooms and the like are for consumption at employees' desks and other places away from the room in which the machines are located--that is, to-go. A live food seller would be able to determine how much of the food was sold to be eaten in his facility or on a to-go basis and so might be able to apportion his gross receipts between taxable and nontaxable under Regulation 1603(c). Obviously, a vending machine operator cannot do that. There is, however, language in the applicable statute, section 6359.2, which seems to indicate a different result.

Section 6359(d)(5) provides that sales of food products through vending machines are subject to tax. Section 6359.2(c) provides that for the year beginning on January 1, 1990, and thereafter, 33 percent of the gross receipts of any retailer from the sale at retail of food products shall be subject to the tax imposed by section 6051 when those food products are actually sold through vending machines. The statute makes clear, moreover, that this provision is not an exemption from tax but an accounting mechanism. Subdivision (d) states as follows:

"The Legislature finds that 33 percent represents the statewide average of food products sold through vending machines which are subject to the tax imposed under this part. Therefore, the Legislature establishes this average as the measure of the tax with respect to vending machine sales to simplify tax auditing procedures and to provide for uniformity in the taxation of gross receipts derived from the sale of food products through vending machines."

This language is ambiguous when another statute is involved. It appears that where 100 percent of the sales of cold food products from a vending machine would be taxable under another statute, such as section 6359(d)(2) (interpreted and implemented by Regulation 1602(f)), the need for the apportionment created by the statute would not arise. Section 6359.2(d) indicates, however, that it is establishing a statewide uniform policy. In addition, as noted above, 100 percent of the sales through vending machines located in a facility where there are tables and chairs might not be taxable depending on how much of the food was sold to-go under section 6359(d)(4). (See, Reg. 1603(c).)

In addition, it has been the announced interpretation of the staff since at least 1988 that sales of food products through vending machines would be taxed at the rate set forth in section 6359.2(c). (See, Reg. 1574(b)(2)(C).) Although the matter is certainly not free from doubt, fourteen years of advice on which vending machine operators have relied should not be reversed lightly. Therefore, we conclude that the policy announced in Mr. Hirsig's memorandum re: REDACTED TEXT, and the 1988 Notice should continue to be followed.

I am, by copy of this memorandum, requesting that it be considered for annotation.

JLW:sr

cc: Mr. Ramon J. Hirsig (MIC:43)
Mr. David H. Levine (MIC:82) (Please review for annotation.)