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August 25, 1994

BURTON W. OLIVER
 Executive Director

Ms. B--- A--- A---
 Administrator, W--- H---
 XXX --- Street
 --- ---, California XXXXX

Re: [No Permit Number]
 Sales of Meals

Dear Ms. Abbaduska:

I am responding to your letter to the Legal Division dated June 30, 1994. You ask for an opinion as to the application of sales tax to W--- H---'s sales of meals to its residents.

You describe the factual background as follows:

"W--- H--- is a retirement home with 37 living units which supplies room and optional board for its residents who are all over 65 years of age. W--- H--- is exempt from Federal Income Tax under Section 501 (c) (3) and California Franchise Tax under Section 2730 (d).

"W--- H--- contracts with an independent caterer, R--- H---, which prepares and provides meals to W--- H--- residents on the premises. R--- H--- provides breakfast, lunch, and dinner.

"Currently, W--- H--- residents pay a monthly maintenance fee which does not include the cost of optional meals.

"Commencing in 1995, 12 residents of W--- H--- will be required to eat 6 meals per week, which cost will be included in their monthly maintenance fee."

You are of the opinion that tax should not apply to the meal sales to the 12 residents who are obligated to take their meals at W--- H---.

OPINIONA. 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.O.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 by Institutions.

Regulation 1603(m), interpreting and implementing Section 6363.6, provides as follows:

"Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients or residents of an 'institution' as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to person other than patients or residents of that institution."

(Sales and Use Tax Regulations are issued by the Board to aid in the enforcement and administration of the Sales and Use Tax Law and have the force and effect of law.)

The provision of Regulation 1503 which may apply to your fact pattern is sub-division (a)(3) which includes as an "institution" any "house, retirement home or similar establishment supplying board and room for a flat monthly rate and serving as a principal residence exclusively for person 62 years of age or older. For purposes of this regulation, the term 'exclusively' is defined to mean that no more than four persons under 62 years of age are in residence during any calendar quarter."

C. Tax Consequences to W--- H---

In order to qualify for the exemption, implemented by Regulation 1603(m), then, the institution must satisfy two criteria - (1) no more than four of its residents may be under 62 years of age; and (2) board and room must be supplied for a flat monthly rate. You indicate that all of W--- H---'s residents are 65 years of age and older, which satisfies the first criterion. Because

meals are not supplied as part of the monthly fee, however, we are of the opinion that the exemption provided by Regulation 1603(m) does not apply to W--- H---'s current operation.

We are also of the opinion, however, that this exemption will apply to W--- H---'s sales of meals to the 12 residents who will be required to eat there beginning in 1995. You state that the cost of such meals will be included in the monthly fee. There is no requirement in the regulation that all residents be supplied room and board for a flat monthly fee. We thus conclude that W--- H---'s provision of room and board for a flat monthly rate to the twelve residents who will come under that arrangement in 1995 will not be subject to tax.

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