

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)

November 3, 1978

Mr. M--- J. S---  
Tax Counsel  
C--- F--- I---  
P.O. Box XXXXX  
--- ---, CA XXXXX

SY -- XX XXXXXX

Dear Mr. S---:

Following our meeting with you in Sacramento and your follow-up letter of September 28, 1978, we have reviewed the question of whether or not foil sold by C--- F--- to S--- which is used to wrap baked potatoes is resold or consumed by S---.

This question first arose during an audit of C--- F--- S--- (CFS) by the Board. At that time, the auditors, relying on Business Taxes Law Guide Annotation 440.0480, found that CFS's sale of potato wrap to S--- was a taxable sale.

Annotation 440.0480 deals with the situation where foil potato wrap is utilized during the baking process and then remains on the potatoes when they are served. It was concluded that in such a situation the foil was purchased primarily for use as a wrapper for baking potatoes and not for use as a container for serving the potatoes. Accordingly, the sale of the foil to restaurants was considered a taxable retail sale rather than a sale for resale.

Following our letter to you of September 1, 1978, in which we concluded that your sales of foil were similar to those described in Annotation 440.0480, and thus taxable, you have attempted to distinguish CFS's sales of foil to S--- from those described in the annotation. Basically, it is your position that the foil serves no purpose in the baking process and that the foil is only put on the potatoes prior to cooking because it is more convenient and easier to wrap them when they are cold. You state that your customers react negatively to potatoes served without foil. You note that use of the foil reduces customer complaints concerning discolored or unsightly potatoes and the use, in some instances, of boiling potatoes as substitutes for baking potatoes.

We are also in receipt of a box of foil which you have provided for our inspection. The foil is supplied in a 500 sheet pop-up box. Each sheet of foil measures 7" x 10 - 3/4". We note that due to the size of the foil it would only be used to wrap small items such as potatoes or perhaps vegetables.

Finally, you have brought two annotations to our attention which you believe require a change in our position. The first is Annotation 550.1580 (January 28, 1955) which deals with the delivery of food in the containers or pots in which it is cooked. In that situation, it was found that the addition of the containers did not change the analysis that the sale was of food for human consumption away from the premises. The second Annotation was 195.0860 (November 17, 1953) and dealt with the sale of plants in pots or cans which contain peat. In such a case, the peat was found to be an article in which tangible personal property was placed for shipment and thus exempt from tax.

We are of the opinion that the foil sold by CFS and used by S--- in the manner you describe serves the purpose of a container for the baked potatoes sold with the meal rather than as an essential element to the cooking process. We find the situation described by you to be similar to that in which an item is cooked in a nonreturnable container and then sold. As such, tax will not apply to the sale by CFS of the foil wrap to S--- since such sales can properly be considered sales for resale.

Very truly yours

Mary C. Armstrong  
Legal Counsel

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cc: Mr. Thomas P. Putnam  
Assistant Chief Counsel