

M e m o r a n d u m

To: Mr. Charles Tavookjian
Supervising Tax Auditor - --- (--)

Date: November 17, 1994

From: John L. Waid
Tax Counsel

Subject: Sales of Food in an Amusement Park

I am answering your memorandum to me dated September 28, 1994. You were following up on our previous telephone conversation regarding sales of food products inside a private amusement park. You describe the park operation as follows:

"The taxpayer operates an amusement park which is made up of an arcade area, miniature golf course, water slides, and a baseball batting range. The entire park is fenced in. There is no admission charge. Once in the park one can take advantage of the various attractions for a fee. There are two eating facilities at the park. One is in the main arcade area which seats about 18 inside at tables and chairs and six to eight round concrete tables and benches seating four each located right outside of the arcade area. In addition, there is a 'Captain Kids' area which has inside tables and chairs for about 35 with concrete tables and benches right out side seating about another 30. The food products are all sold in a ready to eat condition. No one comes to the park for the express purpose of buying food to take out."

You ask if the entire park would be considered "premises" of the seller under Regulation 1603(c) or would Regulation 1603(f) apply.

OPINION

Regulation 1603(c) applies to subject sales of food sold on a "take-out" or "to-go" basis to tax if certain conditions are met. You state that people do not come to the park to buy food on a to-go basis. You do not, however, indicate the kind of food-selling operations that are there. From your statement regarding to-go purchases, I conclude that people buy food at food stands located in the park (whether run by the park owners or concessionaires) to consume at the two areas you describe and, possibly, at other areas in the park. Some food may be taken out, but the food is not sold on that basis. Since the food is not sold on a "take-out" basis, Regulation

1603(c) cannot apply to these sales. The issue, then, is if the two eating areas you describe are "facilities of the retailer" under Regulation 1603(f).

We have previously held that, for eating facilities located in the same general area as the food retailer to be considered as facilities furnished for consumption of the retailer's products by the person with whom the retailer contracts to sell the products, there must be some rational connection between the facilities furnished for food consumption and the person selling the food. If the facilities are located some distance away from the retailer, are owned by persons other than the retailer, and are provided primarily for the general use of park patrons, the fact that the retailer's customers use the facilities to consume food products bought at the retailer's stand is not sufficient to constitute "facilities" under sub-division (f). What this "boils down to" is that it must be shown with some certainty that the benches, tables, and chairs are provided for the purpose of consumption of the food.

From your description, it appears that the benches, tables, and chairs are provided for the purpose of eating the food bought at the stands in the park. They seem to be in close proximity to the food sales operations. Food is sold, but not on a to-go basis, so it must be consumed somewhere. Park patrons might also bring their own food (you do not indicate if that is permitted) and consume it on the benches, tables, and chairs, but if that happens it is likely a result of the benches being there, not the purpose for their placement. We thus conclude that there is a rational connection between the food-selling operations and the benches, tables, and chairs so as to constitute them as "facilities" within the meaning of Regulation 1603(f). The food products sold are suitable for consumption at those facilities. Sales of food within the park are thus subject to tax even if the patrons buy food at the stands and then take it to other areas of the park to eat.

JLW:te