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December 6, 1993

Mr. E--- D---
The B--- L--- Company
P.O. Box XXX
--- ---, CA XXXXX

BURTON W. OLIVER
Executive Director

Re: Cold Food, Hot Food, and Beverages
SR -- XX-XXXXXX

Dear Mr. D---:

This is in response to your letter of October 7, 1993, in which you request our opinion as to the correct application of tax to various sales of cold foods, hot foods, and beverages by a caterer. In a phone conversation on November 10, 1993, you indicated that (1) food and beverage items are separately stated, (2) you have no on site eating facilities, and (3) items for resale is not an issue. You have asked for our opinion regarding the taxability of seven scenarios. Each scenario is followed by our analysis.

“A. For the purpose of convenience and visual appeal we place the COLD sandwiches and salads in a plastic box with a lid, paper bag, or paper box; usually along with a cookie or other similar dessert, these of course are ‘box lunches’. Alternatively, depending on the customers wishes, we sometimes put the same foods on disposable platters and give them disposable napkins, plates and utensils to go with it; these are ‘cold buffets’. We do offer delivery of the above foods and when this is requested (which is most of the time), one of our employee's (sic) will bring the food to the location where it will be eaten and leave; sometimes that employee will unpack the boxes, bags or platters and put them on a side table somewhere in the building. However, except in very rare situations, no other service i.e. table service or otherwise is offered to the client. Are any of the activities described in this paragraph currently taxable sales?”

Revenue and Taxation Code Section 6006(d)¹ provides that the term “sale” means and includes “[t]he furnishing, preparing or serving for a consideration of food, meals and drinks.”

1 All further code references are to the Revenue and Taxation Code.

Section 6359 exempts the sale of food products for human consumption unless the food is sold in the manner provided in Section 6359(d)(1) through (7). We are of the opinion that you do not serve the meals in question as provided in Section 6359(d)(1). Although a sandwich, salad and dessert comprising a box lunch or cold buffet on disposable platters could qualify as a meal, neither the sale of the box lunch nor that of the cold buffet is taxable under the facts you presented because neither is served as a meal by the B--- L--- Company to its customers. The box lunches and cold buffets would not be considered furnished, prepared, or served from trays, glasses, dishes or other tableware provided by the retailer at facilities of the retailer pursuant to Section 6359(d)(2) merely because the B--- L--- Company has supplied disposable plates and utensils (see, Sales and Use Tax Annotation 550.0100). When a catering business has no on-site eating facilities, it is not considered an establishment that is similar to a restaurant, fast food establishment, etc. Therefore, the business is not subject to the provisions of Section 6359(d)(6) and Sales and Use Tax Regulation 1603(c)².

Regulation 1603(h) relates exclusively to caterers and states the following:

“The term “caterer” as used in this regulation means a person engaged in the business of serving meals, food and drinks on the premises of the customers but does not include employees hired by the hour or day.

Tax applies to the entire charges made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (e) above whether or not served by the caterers. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.

Sales of meals by caterers to social clubs, fraternal organizations or other persons are sales for resale if such social clubs, fraternal organizations or other persons are the retailers of the meals subject to tax under (i) below and give valid resale certificates therefor.”

In the first scenario, the term “caterer” does not apply to your business because you are not servicing meals.

² All further references to Regulations are to Sales and Use Tax Regulations.

In summary, the box lunches and cold buffets do constitute a meal, however, tax does not apply to their sale because they are not furnished or served by the B--- L--- Company in the manner prescribed in Section 6359 and Regulation 1603 to constitute the taxable sale of a meal.

“B. We also sell various types of cold soft drinks to go along with the lunches. Are cold soft drinks taxable sales?”

The food exemption in Section 6359 lists many items as included or not included as “food products”. Food products do not include carbonated beverages (see Regulation 6359(b)(3)). Therefore, your sales of those soft drinks that are carbonated are taxable.

“C. We also sell, package and deliver in the same manner COLD ‘breakfast breads with pastries’ and ‘whole fresh fruits’ and/or ‘fresh fruit salad’ in the morning. To go along with the breakfast items and on rare occasions to go along with ‘cold buffets’ we prepare and deliver ‘HOT’ coffee, tea and cocoa which is put into thermal containers which we go back and retrieve later. Coffee is accompanied by disposable cups, cream and sugar. Are any or all of these items taxable sales?”

Except as otherwise provided in Regulation 1603(b) “Drive-ins”, (c) “Food sold on a ‘take-out’ order”, (d) “Places where admission is charged”, (f) “Food for consumption at facilities provided by the retailer”, or Regulation 1574, “Vending Machine Operators”, “tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products.” (Regulation 1603(e)).

Hot beverages such as coffee, tea, and cocoa are exempt from sales tax unless sold for consumption at the facilities provided by the retailer or sold with a combination of hot and cold foods. Since coffee, tea, and cocoa are sold for a separate price, they remain exempt regardless of the fact they are sold with other taxable items.

Even though the hot beverages are contained in returnable thermal containers, we assume you are not serving the hot beverages and, therefore, the hot beverages are exempt under Regulation 1603(h)³.

The cold pastries and fruit placed on disposable platters are not taxable because they are not considered served as discussed in A above.

“D. We prepare COLD finger sandwiches and hors' D'oeuvres and sell, package, and deliver those items in exactly the same manner as ‘cold buffets’. Are these transactions taxable?”

³We assume the only returnable item is the thermal container for the hot beverages.

As discussed in A above, the cold sandwiches and presumably cold Hors' D'oeuvres would not be taxable so long as they are provided in the same manner as cold buffets and box lunches.

"E. We also prepare and sell 'HOT FOODS' such as lasagna or chicken accompanied by vegetables and/or potatoes in a similar manner. The HOT items are delivered and put out on a side table, kept warm using chaffing dishes (sterno fired food warmers) and usually accompanied by 'Bread' and 'Cold' salads and desserts. The cold items are put on disposable platters. No service is offered in this situation. I am assuming that the entire meal here is taxable, is it?"

Hot prepared food is not exempt from tax. (Sections 6359(a), (d)(7), (e) and Regulation 1603(e)). The term "hot prepared food products" means items that are prepared for sale in a heated condition and are sold at any temperature higher than room temperature. Included are combinations of hot and cold food items when a single price is charged for the combination (Regulation 1603(e)). Therefore, the combination of hot lasagna, bread, salad, and dessert for a single price is all taxable.

"F. We are sometimes contracted to provide picnics at parks 'Company Picnics'. Sometimes the foods are all 'Cold' on disposable platters and no on-site service is offered. Sometimes we provide Cooks to 'Grill Meats' or vegetables for these events. Whenever we grill foods on-site we also bring cold foods. Is the 'All Cold Food Transaction' not taxable and the 'Some Hot Food' transaction taxable or do we just tax the Hot Food and not the part of the transaction that is cold."

As discussed previously, the all cold food on disposable plates where no on-site service is provided is non-taxable for "company picnics".

For the situations where you provide cooks to grill meats or vegetables, tax applies to the entire charge made by caterers for serving meals (see, Regulation 1603(h)). When a single price is set for a combination of hot and cold food, the item amount is taxable.

"G. Occasionally we do cater full service events with waiters and a combination of hot and cold foods. I assume these events are 100% taxable transactions, are they?"

As in the previous scenario, tax applies to the entire charge by a caterer for serving meals, food and drinks.

Enclosed for your information is a copy of Regulation 1603. If you need anything further, please do not hesitate to write again.

Sincerely,

Carl J. Bessent
Staff Counsel

CJB/md

cc: San Francisco - District Administrator
Mr. Michael Lorenz
Senior Tax Auditor San Francisco District