

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)  
(916) 323-7712

May 31, 1990

Mr. J. O---, President  
C--- of S--- D---, Inc.  
XXXX --- Road  
--- ---, CA XXXXX

Dear Mr. O---:

Re: F---'s I--- C--- P--- Restaurant  
SY - XX XXXXXX-010

Enclosed is a copy of the Decision and Recommendation pertaining to the petition for redetermination in the above-referenced matter.

I have recommended that the determination be redetermined without adjustment as explained in the Decision and Recommendation.

There are three options available to you at this point.

1. If, after reading the Hearing Decision and Recommendation, you believe that you have new evidence and/or contentions, you should file a Request for Reconsideration. No special form is required to file the Request for Reconsideration, but it must be filed within 30 days from the date of this letter and clearly set forth any new contentions. If new evidence is the basis for filing the request, the evidence must be included. Direct any such request directly to me, with a copy sent to the State Board of Equalization, P.O. Box 942879, Sacramento, CA 94279-0001, Attn: Principal Tax Auditor. I will subsequently notify you whether the request has been taken under review or whether the request is insufficient to warrant an adjustment. If I conclude that no adjustment is warranted, I will then notify you of the procedure you can follow to request an oral hearing before the Board.

2. If, after reading the Hearing Decision and Recommendation, you find that there is no basis for filing a Request for Reconsideration, but nevertheless desire to have an oral

hearing before the Board, a written request must be filed within 30 days with Ms. Janice Masterton, Assistant to the Executive Director, Board of Equalization, P.O. Box 942879, Sacramento, CA 94278-0001.

3. If neither a request for Board Hearing nor a Request for Reconsideration is received within thirty (30) days from the date of this letter, the Hearing Decision and Recommendation will be presented to the Board for final consideration and action.

Sincerely,

H. L. Cohen  
Hearing Officer

HLC:ct  
Enc.

cc: Mr. P. L---, CPA  
XXX S. --- Street, #XXX  
---, CA XXXXX (w/enclosure)

Ms. Janice Masterton  
Assistant to the Executive Director (w/enclosure)

Mr. Glenn Bystrom  
Principal Tax Auditor (file attached)

--- --- – District Administrator (w/enclosure)

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

550.0064

APPEALS UNIT

In the Matter of the Petition	)	HEARING
for Redetermination Under the	)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:	)	
	)	
C--- OF S--- D---, INC.	)	No. SY – XX XXXXXX-010
dba F---'S I--- C---	)	
P--- RESTAURANT	)	
	)	
<u>Petitioner</u>	)	

The above-referenced matter came on regularly for hearing before Hearing Officer H. L. Cohen on April 13, 1990, in San Diego, California.

Appearing for Petitioner:	Mr. P. L---, CPA
	Mr. J. O---, President
Appearing for the Department of Business Taxes:	Mr. T. Bingham Senior Tax Auditor San Diego District
Observers:	Mr. A. Nevarez Hearing Officer Appeals Unit
	Ms. J. Saunders Hearing Officer Appeals Unit

Protested Item

The protested tax liability for the period February 1, 1985 through March 31, 1987 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Claimed exempt sales of food products disallowed	\$331,412

### Contentions

Petitioner contends that:

1. Packaged candy is not sold for consumption on petitioner's premises and is therefore exempt from tax.
2. The candy department is a separate entity and candy is not served at booths or tables.
3. Applying tax on candy sales would put petitioner at a competitive disadvantage.

### Summary

Petitioner is a corporation which operates a franchised ice cream parlor and restaurant. Candy is also sold at the restaurant. The area in which candy is displayed for sale is separated from the area containing tables and booths by an archway. The cash register for the restaurant is in the candy area. Customers of the restaurant must pass through the candy area, past the displayed candy, to reach the cash register and the exit. Petitioner estimates that seven to ten percent of total sales are candy sales.

Petitioner charged sales tax reimbursement and paid sales tax to the Board based on sales at tables and booths. Sales tax reimbursement was not charged on sales of candy and tax was not paid on such sales. The Board's Department of Business Taxes (DBT) concluded that sales of candy by petitioner were not exempt from tax because petitioner's sales were predominantly (over 80%) of food products and over 80% of the sales of food products were taxable. The sales of candy were therefore excluded from the exemption from tax for sales of food under Section 6359 of the Revenue and Taxation Code. The specific exclusion is in subdivision (d)(6) of Section 6359. DBT therefore disallowed all sales claimed to be exempt by petitioner on its returns.

Petitioner contends that the exclusion cited by DBT was not intended to apply to restaurants with separate candy departments. Petitioner contends that its candy department is the equivalent of a walk-in candy store in which sales of candy are exempt. Petitioner contends that the change in the law which added subdivision (d)(6) to Section 6359 was intended to apply tax to restaurant food for takeout, not to candy. It was intended to make everything sold in a restaurant taxable, not candy sold outside the restaurant area. Petitioner also contends that the candy department is really a separate business and should not be affected by the restaurant operations.

Analysis and Conclusions

Section 6359 of the Revenue and Taxation Code exempts from tax the gross receipts from the sale of food products for human consumption. Subdivision (b) includes, within the definition of "food products", sugar products. This is the basis for the exemption from tax of sales of candy. Subdivision (d)(2) provides that the exemption does not apply when the food products are served for consumption at tables, chairs, or counters which are furnished by the retailer. The provision makes sales of food served at restaurants subject to the tax. Subdivision (d)(6) provides that the exemption does not apply when the food products sold are furnished in a form suitable for consumption on the seller's premises if over 80% of the seller's gross receipts are from the sale of food products and over 80% of the seller's retail sales of food products are subject to tax under subdivisions (d)(1), (2), (3), or (7).

The candy sold by petitioner is in a form suitable for consumption on petitioner's premises, i.e., no preparation is needed to render it ready to eat. Petitioner's sales are essentially all food products. By petitioner's own estimate, 90 to 93 percent of petitioner's sales are restaurant sales of food products subject to tax under subdivision (d)(2) of the regulation. It is thus immaterial that the candy may not be specifically sold for consumption on petitioner's premises, or that it is never served to customers at petitioner's tables or booths.

I see no basis for finding that petitioner's candy department is a separate entity. The entrance and exit are the same as that used by restaurant patrons and the sales are rung up by the same cashier at the same cash register.

Although the application of tax to petitioner's candy sales puts petitioner at a competitive disadvantage with candy stores, there is no disadvantage with respect to other restaurants many of which offer candy for sale at the cash register location.

While the legislation which added subdivision (d)(6) was sponsored by the fast food industry which probably was concerned primarily with sales of cold food to go, the statute does not make any distinction as to what type of food to go is sold.

I note that the December 1984 issue of the Board's publication "Tax Information" notified all taxpayers of the addition of subdivision (d)(6) to Section 6359.

Recommendation

Redetermine without adjustment.

\_\_\_\_\_  
H. L. Cohen, Hearing Officer

5-15-90  
Date