

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

550.0085

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
F--- C--- M---, INC.) No. SX -- XX XXXXXX-010
)
)
Petitioner)

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on December 8, 1993 in Hollywood, California.

Appearing for Petitioner: H--- R---
Certified Public Accountant

Appearing for the
Sales and Use Tax Department
(SUTD): John F. Sheehy III
Supervising Tax Auditor

Victor M. Avila
Tax Auditor

Protested Item

Disallowed claimed food deduction on an actual basis measured by \$117,392 for the period of October 6, 1988 through December 31, 1991.

Contentions

1. The products sold in the juice bar were not intended to be consumed on the premises and were served in containers suitable for take-out; therefore, sales tax would not apply.

2. Petitioner was given erroneous oral advice by a Board employee with respect to the taxability of sales from the juice bar. Therefore, even if tax does apply, petitioner should not be held liable.

Summary

The subject of this petition involves the operation of a juice bar, where fruit juices, ice cream, and yogurt are sold. The business is located within a food court inside a shopping mall. In addition to the juice bar, petitioner operates three other units (in the food court) selling hamburgers, Korean hot soup, and hot and cold Japanese food. There is a common seating area within the food court, which customers may use for consuming the food purchased.

During a routine audit, it was discovered that no tax reimbursement was charged or sales tax paid to the Board for any sales made at the juice bar. The auditor allowed some sales as valid sales for resale and tax was assessed on the remainder. Petitioner filed a Petition for Redetermination arguing that the food products sold at the juice bar were not intended to be consumed on the premises or in common dining facilities within the food court. All products were served in containers suitable for take-out. Juice was sold by the cup and served with a cap placed on top. The juice bar is not subject to the allocation of rent for the common seating area, although other tenants bear their prorated share.

At the conference, SUTD argued that all retail sales of juice were served in cups of a normal size for immediate consumption at the premises. The auditor was told by a waiter that food could not be taken out of the common area. He also noticed signs containing iconic symbols of food on a tray, within a circle, with a slash through it. Below this symbol the sign contained a statement in Korean. He interpreted the sign (symbol), along with the waiter's statements, to mean that food could not be taken from the food court area. The signs were located on each side of closed double doors, which were the only means of entering or leaving the food court. While he was there, no one left the food court area with food. SUTD feels that the presence of the signs and seating proves that facilities are provided for consumption of the juice, ice cream, and yogurt on the business premises. Furthermore, since petitioner owns the entire facility, it is in effect providing seating facilities for all customers of the juice bar.

Petitioner argues the shopping center is owned by a related corporation of petitioner, but not petitioner. Juice is served in a form suitable for take-out because a cap is placed on the cup. The sign that SUTD employees observed states that servicing trays are not to be taken from the area; therefore, it does not prohibit the removal of food. The symbol on the sign only showed trays--not food. Ice cream and yogurt may be served either by cone, bowl, or larger cardboard boxes when sold in bulk. Petitioner will provide copies of lease agreements as proof that while other tenants must pay a prorated share of rent towards the common seating facilities, petitioner does not.

SUTD noted that during the above audit period, the juice bar actually only operated from April 1989 through December 1991. During this same period of time, the total sales for all four units which petitioner operated, amounted to \$1,540,000. Of this total, juice bar sales only amounted to \$138,368.

As to petitioner's argument it received erroneous advice from a Board employee, there was no written request made by petitioner, nor was petitioner provided anything in writing from the Board.

In a follow-up letter of December 14, 1993, Mr. R--- provided a picture of the sign which he claims was at the business premises, and observed by the auditor. Attached to the letter were partial copies of petitioner's lease agreement for the juice bar, and an agreement for the operation of another unit (Japanese restaurant) within the same food court. The sign portrayed in the picture shows a glass (with straw inside) and hamburger/ sandwich setting on a tray. This is all contained within a circle. There is a diagonal slash through the middle of the circle, and writing in Korean below. The lease agreement for the juice bar provides a description and location of the business, but does not contain a statement whether petitioner must pay a proportionate share of rent towards seating facilities. The other agreement also provides a description of the premises and specifically mentions a "proportionate share of common dining area" (rent?).

An employee of the Board's Hollywood office (auditor James Han), after reviewing the picture of the sign submitted by petitioner, interpreted the Korean language at the bottom of the sign to read as follows: "Food tray outside - do not take."

Analysis and Conclusions

Sales tax applies to food products sold in a form suitable for consumption on the seller's premises regardless of whether the food product is sold "to go", provided over 80 percent of the seller's gross receipts are from the sale of food products, and over 80 percent of the seller's retail sales of food products are sales subject to tax as one of the following: (1) sales of meals by the seller, (2) sales of food consumed at facilities provided by seller, 3) sales of food by a "drive in", or (4) sales of hot prepared food products. Whether or not the 80-80 test is met, sales tax applies to the above four enumerated types of sales. (Revenue and Taxation Code Section 6359(d).) Food products include milk products (ice cream or yogurt) and all fruit and vegetable juices. (Rev. & Tax. Code § 6359(b)(2), (3).)

Based on my review of all the evidence, I conclude petitioner's sales at the juice bar were all taxable, with the exception of the sales for resale, which were already allowed by the auditor. To qualify as taxable, the food products sold need only be in a form suitable for consumption on the premises regardless of whether the food product was sold on a "to-go" basis. The only other two requirements are that over 80 percent of petitioner's gross receipts are from the sale of food products and over 80 percent of the retail sales of food products are subject to tax by one or more of the four enumerated methods indicated above. Because petitioner operated four units under one permit within the food court, the activities of all four units combined must be taken into consideration.

Clearly, 100 percent of petitioner's gross receipts was from the sale of food products. Looking at the activities of all four units combined, petitioner made sales of meals, sales of food products for consumption at seating facilities which petitioner provided, and sales of hot prepared food products. Whether or not petitioner paid a proportionate share of rent towards the common seating facilities for operation of the juice bar is irrelevant. Petitioner paid its proportionate share of rent towards a common seating facility for its remaining three units operated; thus, petitioner provided seating facilities.

Even if petitioner had not provided any seating facilities, the sales at the juice bar would still be taxable, because the total sales (\$138,368) equaled only nine percent of the combined total for all four units (\$1,540,000). Therefore, the remaining \$1,401,632 represented sales of meals and hot prepared food products. Because this figure represents 91 percent of all sales, and thus exceeds 80 percent of all sales made, the sales at the juice bar would be taxable even if seating was not provided.

As to whether petitioner is entitled to relief for the alleged erroneous advice received, Revenue and Taxation Code Section 6596 provides that if a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from the Board, the person may be relieved from the sales or use taxes imposed and any penalty or interest added thereto. However, one of the conditions which must be satisfied in order to utilize this statute is the request in writing to the Board for advice whether a particular activity or transaction is subject to the sales or use tax. This is because when the questions and responses are oral, we cannot determine with certainty what questions were asked and what advice was given.

Here, although petitioner argues it received erroneous advice from the Board, no evidence of a writing has been presented. Accordingly, relief cannot be granted.

Recommendation

Deny the petition.

Lucian Khan, Staff Counsel

Date