

**M e m o r a n d u m****550.0182**

To: Ms. Joan M. Albu  
Supervisor, Operations Section

March 22, 1991

From: John Waid  
Tax Counsel

Subject: T--- Concessions  
SY -- XX-XXXXXX

Assistant Chief Counsel Gary J. Jugum has referred your memorandum of March 6, 1991, to me for a response. You are of the opinion that the above taxpayer should not be treated as a caterer, which conclusion of the Legal Division was expressed in my memorandum to Mr. A. L. Giorgi, Return Review, dated January 29, 1991.

You indicate that Return Review, at your direction, has obtained additional facts from the taxpayer as follows:

“The taxpayer states that the park benches are about ¼ mile away from the concession stand and that the contract with the park department is silent regarding the benches.”

**OPINION**

We believe it is clear from Revenue and Taxation Code Section 6359(c)(2) that in order for meals to be excepted from the food product exemption some service element is required. This means there must be at least some rational connection between the facilities furnished for the meals' consumption and the person selling meals. If the tables and chairs (or other facilities) are some distance from the concessionaire, are owned by persons other than the concessionaire, and are provided for other uses, the fact that retailers' customers use the facilities is not sufficient to constitute “service”.

What this “boils down to” is that it must be shown with some certainty that the tables and chairs are provided for the purpose of the consumption of the meals. This may be shown by the proximity of the tables to the concessionaire, the fact that the tables and chairs are in the same room as the concessionaire, percentage of persons using the tables and chairs for purposes other

than eating meals, and the fact that the retailer services the tables by keeping them clean of refuse and the like.

We agree with your conclusion that T--- Concessions should not be treated as a caterer under these additional facts. The facts as originally stated by Return Review indicated that the park district provided tables for food consumption readily accessible to the taxpayer's customers. T--- Concessions' position thus appeared to be similar to that of a food retailer in a food mall where seating was provided for the general benefit of patrons of all the retailers therein. It now appears that there is no rational connection between the facilities which the park district has furnished and T--- Concessions. The tables are some distance from T--- Concessions' stand and appear to be available for general use. T--- Concessions appears to have no responsibility to maintain or police the facilities. The mere fact the taxpayer's customers use the tables is insufficient to provide the element of "service" required by Regulation 1603.

This result finds a close parallel to that contained in Annotation 550.0620, "Parking Facilities" ["Drive-Ins"]. We stated therein that the fact that supermarkets and shopping centers provided parking facilities for general use was not sufficient to classify coffee and snack bars located therein to be classified as "drive-ins".

JLW:es  
3790I

cc: Mr. Gary J. Jugum  
Mr. O. A. McCarty, Supervisor, Return Review