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December 20, 1993

Mr. [D]
[S]
XXXX --- ---
--- ---, Suite XXX
P.O. Box XXXXXX
---, -- XXXXX-XXXX

RE: [No Permit Number]
Taxation of Food Sales

Dear Mr. [D]:

I am responding to your letter dated November 15, 1993, to Assistant Chief Counsel Gary J. Jugum. You seek our opinion of the correct application of tax on certain products sold at retail for human consumption in the grocery industry. Since you did not identify the taxpayer, this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code Section 6596. Rather, it constitutes general comments regarding the applicability of California Sales and Use Tax Law to a set of hypothetical facts.

OPINION

1. Sparkling (Carbonated) Fruit Juices.

“[I]t appears that all fruit juices whether or not carbonated are exempt from the tax. Your confirmation to that regard would be appreciated. Another question is, what constitutes “fruit juice”? Does it have to be 100% fruit or can it contain part juice and part water? Do preservatives in juice exclude it from the definition of ‘fruit juice’? It is important to our client because several of their customers have complained of discrimination in the tax application. Specifically, they argue, some carbonated apple cider, Martinelli’s, for example, is exempt while others are

taxable. (See copy of attached 1979 letter to Martinelli and Company.) Is Martinelli unique and, if so, why?"

Under Regulation 1602(a)(2), fruit juices are considered food products but carbonated beverages are not. Fruit juices do not have to be 100% fruit juice. With regard to carbonated fruit juices, we have taken a middle ground. Although technically "carbonated beverages" and thus excluded from the definition of "food products," we consider carbonated juices that are 100% fruit juice-like Martinelli's Sparking Cider to be "fruit juices" rather than "carbonated beverages." If the carbonated product also contains a preservative, such as sodium benzoate, or any other additive or is not 100% fruit juice, it will not be considered a natural fruit juice and tax will apply to its sales.

2. Distilled Water.

"In 1992, Proposition 163 amended Section 6369 of the Sales and Use Tax Law to include bottled water as a "food product" for human consumption [subsection (b)(3)]. Bottled distilled waters were not differentiated from any other bottled water. Staff took the position that the term 'bottled water' included only non-carbonated and non-effervescent bottled water. Unfortunately, Staff did not address the issue of distilled bottled water. In the past, distilled water was generally assumed taxable because it was not intended for human consumption. Now however, with the advent of a health conscious population, distilled water is sold alongside other bottled water and is used as frequently for human consumption as any other bottled water. Our client would like to agree with its customers that distilled bottled water is not subject to the tax in accordance with the above-referenced section."

The fact that a product is both edible and comestible does not mean that it is a food product within the meaning of the law. (Luer Packing Co. v. S.B.E. (1950) 101 Cal.App.2d 99, 102-103 [224 P.2d 744].) Also, Proposition 163 did not change the definition of any food products other than candy, confectionery, and snack foods. It re-enacted the exclusion for carbonated beverages, so sales of carbonated bottled water are still subject to tax. Regarding bottled water, Proposition 163 only removed the size distinction which had existed in Section 6359.6. Distilled water is a distinct variety of water; had it been intended to merge it with water generally, the proposition would have said so. Sales of sterile water have long been considered taxable. (Annot. 245.1070.) Our research indicates that the majority of distilled water is still sold for purposes other than consumption by humans even though it is sold alongside regular bottled water. Generally, when it is sold for human consumption it is sold for its medicinal qualities, such as an aid to digestion. Medicines are excluded from the definition of "food products" under Regulation 1602(a)(4). Therefore, sales of bottled distilled water are subject to tax.

3. Hot Beverages.

“[O]ur client wants to take the position that hot coffee, tea, cocoa, and other hot beverages except soup, bouillon, or consommé) when sold as a single priced item or in combination with another item for a separate price in a grocery store is not subject to the tax. The same rationale would hold that a cup of hot coffee (hot beverage) and a donut (bakery product) sold in combination for a single price is not subject to the tax. Is the taxpayer position correct? Does the answer change if the grocery store has inside seating? Does the answer differ if the seating is outside?”

Your client is partially correct. Under Regulation 1603(e), hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is not taxable unless taxable under certain other sub-divisions. When a hot food product is sold with an otherwise cold combination of foods for a single price, tax applies to the entire established price. If, however, the customer buys the coffee and another item and the total price is determined by adding up the separate prices of the items, then the sale of the coffee is exempt.

Having seating alters things somewhat. One of the conditions by which the sale of coffee for a separate price becomes subject to tax is provided in Regulation 1603(f), under which the sale of food products in a form suitable for consumption at facilities of the retailer, such as seating, is subject to tax. It would not matter if the seating were inside or out, provided one of the purposes of the seating is for customers to consume food products sold by the store.

4. Ice Cubes, Block Ice and Dry Ice.

“According to our clients, customers argue that ice is simply frozen water and, since water is exempt, ice should also be exempt. Section 6359.7 does allow an exemption when ice is used in shipping and transporting food for human consumption but we are unaware of any treatment in either the code or regulations on the general issue of ice for human consumption. It has always been assumed that it is taxable because it is not explicitly exempt.”

Although the sale of water may be exempt under certain circumstances (e.g., § 6353-water sold through utility lines and pipes), water is not a food product. (Reg. 1602(a)(2).) The exemption for ice or dry ice is limited to transportation in intrastate, interstate, and foreign commerce. Therefore, sales of ice are subject to tax.

5. Labels.

You describe labels affixed to food products to describe the product both in terms of quantity, pricing and coding. You ask if they are exempt due to the fact that they contain product information and are resold with the product. If the label is descriptive of the contents of

the container to which it is attached it is regarded as being purchased by the vendor for resale with the product, and his purchase is exempt as being purchased for resale. (Reg. 1589(b)(2)(B); Annot. 195.1740.) If the sale of the product to the customer is exempt, the sale of the attached label is exempt also. (See, e.g., Annot. 195.1920.) However, sales of labels that are primarily price labels are taxable. (Annot. 195.1930.) A label is primarily a price label only when it can be said that the wording on the label other than the price is merely incidental. (Annot. 195.2060.) Sale of labels primarily for self-identification purposes is also subject to tax. (Annot. 195.1860.) Sales of labels for advertising purposes are also subject to tax. (Annot. 195.1700.)

In the sample you enclosed, the labels listing a “two-fer-” price are price labels the sale of which is subject to tax. (See, e.g., Annot. 195.1930.) The label which says only “50% More Toppings” is for advertisement purposes and so subject to tax. Sales of the label which contains the phrase “50% More Toppings,” a price, and a code bar, are subject to tax because they can only be sold for three taxable uses- advertising, price, and internal information.

6. Health Related Products.

You enclosed copies of literature on certain health-related products and ask for an item-by-item response. In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms- liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then its sales are taxable if one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement, or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories. (Annot. 245.1300.)

a. Carbo Electrolyte Charged Cooler is a drink advertised as a means to maintain fluid, energy, and electrolyte balance, and is apparently designed to be consumed prior to an athletic event. We have previously determined that such items are liquid dietary adjuncts the sales of which are subject to tax. (See, e.g., Annot. 245.1140.)

b. Solid Mass is described on the package as “the most advanced weight gain formula designed for bodybuilders and those athletes striving for the utmost in weight gain. SOLID MASS contains the most muscle developing calories of any other weight-gain product available. SOLID MASS contains 38 grams of the purest predigested muscle building protein.” A powder, it must be mixed with milk to be consumed. This product is a powder designed to aid in the intake of calories and to help the athlete gain weight and so is a dietary supplement the sales of which are subject to tax.

c. Diet Octane. The brochure describes this product as a “nutritional supplement powder” to help an athlete maintain weight or to help in ordinary weight loss. See response to 6.b.

d. Nutrition Bars are not in one of the seven forms set forth in Regulation 1602(a)(5) and so not subject to its strictures. As a result, sales of such products are exempt from tax. Please note, however, that, during the period July 15, 1991 through November 3, 1993 sales of these products were taxable as sales of snack foods

e. Heavyweight Bulk-up is apparently a powder designed to be mixed with either milk or water to be consumed. The brochure describes it as “the most comprehensive anabolic weight-gain product on the market today.” See response to 6.b.

f. Sustacal has been previously determined to be a liquid nutrition product the sales of which are exempt from tax.

g. Amino Acids Pure Muscle Building Formula, Amino 1000 are in capsule form and described as a “nutritional supplement” designed to provide amino acids in order to maintain a proper level of protein for heavy exercise.” See response to item 6.b.

h. Fat Burners, Advanced Formula Fat Burners are tablets and capsules designed “to help develop lean muscle tissue while losing unwanted and harmful body fat.” The purpose of these products is described as to decrease body fat while at the same time increasing lean muscle tissue. See response to 6.b.

h. Liquid Fat Burners product is described as “The Safe and Easy Way to Lose Weight.” It is thus a liquid product designed for weight loss sales of which are taxable under Regulation 1602(a)(5).

i. Yohimbe products are described as supplements which give “increased strength, endurance and power” and are sold in liquid and tablet form. They are thus dietary supplements the sale of which is subject to tax under Regulation 1602(a)(5).

I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es