

## Memorandum

To: Mr. Michael P. Kitchen  
Audit Refund Section (MIC:39)

Date: January 20, 1995

From: Victor G. Matl  
Staff Counsel

Subject: Application of waste by product exemption to sales of firewood used to cook pizzas.

In your memorandum dated September 15, 1994, you request assistance from our office regarding the application of Revenue and Taxation Code section 6358.1, the waste byproduct exemption, to sales of firewood by the taxpayer to a customer, a restaurant chain. The taxpayer is a seller of firewood and charcoal. The restaurant chain is a retailer of food products who uses the firewood as a source of heating to cook pizzas. The taxpayer requests the Board's interpretation of this exemption with respect to the firewood. The taxpayer asserts that its otherwise taxable retail sales of firewood to the restaurant are exempt under Revenue and Taxation Code section 6358.1 because firewood is a waste byproduct and the customer satisfies the definition of an "industrial facility" by being engaged in "the commercial production of goods and services."

Retail sales of tangible personal property in California are subject to sales tax measured by gross receipts, unless specifically exempt by statute. (Rev. & Tax. Code § 6051.) The applicable exemption here is provided by Revenue and Taxation Code section 6358.1:

"(a) There are exempted from taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this state of either of the following:

" . . . .

"(2) Waste byproducts from agricultural or forest products operations, municipal refuse, or manufacturing, which are used in an industrial facility as a fuel source in lieu of the use of either oil, natural gas or coal."

There are two issues which need to be addressed. First, whether the property sold qualifies as a waste byproduct. Second, whether the purchaser qualifies as an industrial facility.

The term "waste byproducts" is not defined in section 6358.1 nor elsewhere in the Revenue and Taxation Code. Those words must therefore be given the meaning they bear in ordinary use. Union Oil Company v. State Board of Equalization (1990) 224 Cal.App.3<sup>rd</sup>. 665.) A "byproduct" is

anything incidentally produced in the course of making another thing. (See Webster's New World Dictionary, Third College Edition, at page 192.) The "forest products operation" may include processing cut trees into logs and, eventually, into wood products. In the course of the processing for purpose of "making another thing," such as cut commercial lumber, incidental products may result. Firewood is one such possible incidental product. Thus, it is possible for firewood to be a waste byproduct of forest products operations. On the other hand, a person may harvest timber specifically for firewood. Under these circumstances, the firewood is not a waste byproduct of forest products operations.

While we agree with the taxpayer that there is no statutory definition of "industrial facility," we disagree with the taxpayer's broad description of "industrial facility" as being "the commercial production of goods and services." The Webster's Third New International Dictionary at page 1155 defines "industrial" more accurately as "employed in a manufacturing service." We do not regard a restaurant which cooks pizzas to be employed or engaged in industrial production or service. Therefore, we conclude that the retailer of food products does not fit the general description of "industrial facility."

Your reference to Business Taxes Law Guide Annotation 440.1320 (3/2/56) is not relevant to this case. The taxpayer does not claim that the firewood was sold for resale. The sole basis for the taxpayer's claim is that its otherwise taxable sale is exempt under Revenue and Taxation Code section 6358.1.

In conclusion, whether or not the firewood qualifies as "waste byproducts" from agricultural or forest products operations, the restaurant is not an "industrial facility." Therefore, the waste byproducts exemption defined in section 6358.1 does not apply to the taxpayer's sales of firewood to the restaurant and such sales are subject to tax.

If you have additional questions, please do not hesitate to write.

BGM:cl

cc: Arcadia District Administrator