



STATE BOARD OF EQUALIZATION

916-324-3828

June 6, 1991

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Dear X-----:

Mr. Gordon D. Seames, Return Review, has forwarded to me the packet regarding [S] Coffee Saver (hereinafter "the Coffee Saver") which you recently sent him in your letter dated March 15, 1991. He has asked me to advise you as to whether or not sales of this product are exempt from sales and use tax as a food product.

I. FACTUAL BACKGROUND

As I understand it, you are a distributor of the Coffee Saver. Currently your sales are limited to military installations. I assume you are planning to market the product elsewhere to entities other than the United States. Hence the need to determine if the Coffee Saver qualifies as a food product.

The brochure describes the Coffee Saver as follows:

"It must be emphasized that the Coffee Saver is not a coffee extender or blend or any other coffee substitute which changes the brewed coffee to something besides coffee. It is, rather, a brewing aid whose primary function is to extract all the flavor without adding any other flavors. But it does perk up the taste by mineralizing the water. [Emphasis in original]"

The Coffee Saver is mixed with the grounds prior to brewing so that only half of the normal amount of coffee is used to brew a full pot. Its ingredients are as follows: (1) caramel powder used to restore color to the brewed coffee; (2) colloidal mineral compound to mineralize the water, to separate the coffee particles for greater surface exposure, and also to impregnate the filter to retard the brewing process; and (3) modified food starch which also separates the coffee particles for a greater surface exposure and impregnates the filter for prolonging the brewing time through extraction. The starch never passes through the filter but stays with the coffee grounds to be discarded. Most of the Coffee Saver stays in the grounds and is thrown away with them.

You enclosed letters from attorneys [Y] and [Z] dated April 18, 1983, and April 14, 1983, respectively, both addressed to X------. In each letter, the attorney concludes that coffee combined with [your product] could still be denominated under FDA regulations as "coffee". Whether or not the Coffee Saver qualifies as "coffee" under FDA regulations has no bearing on whether or not it qualifies as a "food product" for the purposes of the California Sales and Use Tax Law.

II. OPINION

A. Sales and Use Tax Generally

In California, except where specifically exempted by statute, Revenue and Taxation code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 (290 P.2d 201.) "The taxpayer has the burden of showing that he clearly comes within the exemption." Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 (114 Cal.Rptr. 571).)

B. Food Products Exemption

Revenue and Taxation Code Section 6359, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for the sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain a list of products which, either singly or in combination, are considered "food products." Coffee and coffee substitutes are contained in that list. (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.)

C. Tax Consequences

Your brochure states that the Coffee Saver is not a coffee substitute. Therefore, it is not included within the list of food products contained in Regulation 1602(a)(1) & (2). Furthermore, none of the individual ingredients qualify as food products. Regulation 1602(a)(4) states that food coloring is not a food product, so the caramel powder does not qualify. The modified food starch does not go into the brewed coffee but stays in the grounds to be thrown away with them. It is therefore not "sold for human consumption" within the meaning of Regulation 1602(a) and so not a food product in this context. (Reg. 1602(c)) Finally, the colloidal mineral product is not listed as a food product in the regulation.

The brochure calls the Coffee Saver a "brewing aid". It emphasizes that the product does not impart any flavor to the coffee but merely facilitates brewing and that most of the Coffee Saver stays in the filter. It is not added to the brewed coffee. Therefore, it is taxable in the same manner as is the filter.

The food starch and the colloidal mineral product stay in the grounds and are thrown away with them. As a result, these products are consumed by the purchaser of the Coffee Saver and are not resold to the purchaser of the coffee. Because the caramel coloring does go into the coffee, the purchaser of the Coffee Saver buys that portion of the coffee Saver represented by the caramel coloring for the purpose of re-selling it to the purchaser of the coffee. Sales for resale are excluded from the definition of "retail sales" and so not subject to the sales tax. (§ 6007). Therefore, where [X] sells Coffee Saver to persons who sell brewed coffee, it, that portion of the gross receipts which represents the amount of the Coffee Saver made up by the caramel are sales for resale and so excluded from tax. If it is not possible to determine the proportion of coloring to the entire product, the entire gross receipts from the sales of the product are subject to tax.

For your information, I have enclosed a copy of Regulation 1602. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

Encl: Regulation 1602

cc: Mr. Gordon D. Seames, Return Review