

M e m o r a n d u m**385.0558**

To: Mr. Fred Berkey
Supervising Tax Auditor
San Jose District Office

October 17, 1988

From: David H. Levine
Tax Counsel

Subject: S--- S---, Inc.
SR --- XX-XXXXXX

This is in response to your memorandum dated August 16, 1988 regarding the application of the Section 6363 exemption to S--- S---.

You first ask whether S--- S--- qualifies as a “public school” within the meaning of that term as used in Revenue and Taxation Code Section 6363. You have included a copy of a memorandum from Tax Counsel Charles Graziano dated May 31, 1984, together with copies of the Bylaws and Articles of Incorporation of S--- S---. Mr. Graziano concluded that the term “public school” as used in Section 6363 includes auxiliary organizations which are organized and operated under the Education Code and applicable regulation to provide food service to students of the state university and college system. (See 5 Cal.Admin.Code § 42400 et seq.) The documents you have provided supports the conclusion that S--- S--- is an auxiliary organization constituting a “public school” under Section 6363 as analyzed by Mr. Graziano. For example, Article III, Section 1 of S--- S---’ Bylaws recognizes the responsibility of the college president to require auxiliary organizations (presumably such as S--- S---) to operate in conformity with the policy of the University’s Board of Trustees commensurate with provisions of Title 5 of the California Administrative Code, Section 42402. Further, Article VIII of the Articles of Incorporation provides that upon dissolution of S--- S---, assets shall be distributed to nonprofit corporations organized and operated for the benefit of --- --- State University.

Among the items S--- sells are hot meals, salads, sandwiches, carbonated beverages, beer, wine, ice cream, coffee, doughnuts, candy, chips, etc. You note that S--- reports its receipts from the sales of food as not subject to tax except for food served in the faculty staff dining area and the beer and wine sales served in the S--- Pub. The subject exemption is nfor sales of meals or food products to students by a school. (Reg. 1603(j)(2)(A).) Carbonated beverages are not

“food products.” (Reg. 1602(a)(2).) This means that sales of carbonated beverages are not exempt under Section 6363, even if sold to students, unless part of exempt meals. The sale of a carbonated beverage is part of the sale of a meal when the combination is sold for a single established price. If a single price for the combination of a carbonated beverage and the rest of the meal is listed on a menu or wall sign, a single price has been established. (Cf. Reg. 1603(e)(1).) Thus, except when sold to a student as part of an exempt meal, all sales by S--- of carbonated beverages as subject to tax. The same rule is applicable to beer and wine sales.

Your next question is:

“How should S--- S--- determine the ratio of non-taxable student food service sales to the total food service sales? It is not practical from a cost standpoint to individually segregate students and non-students at the point of sale.”

You have described a situation in which non-students purchase meals from the S--- S--- facilities. You have provided us with a copy of a letter from Principal Auditor H. A. Dickson dated September 23, 1965 in which he notes that tax could be reported based on the percentage that non-exempt sales (sales of meals to non-students) bears to the total amount of sales. We agree with this conclusion; however, the answer to your specific question is within your expertise. We recommend that you advise S--- of an appropriate sampling method that is satisfactory to the audit staff for reporting the appropriate percentage of taxable sales.

Your next question relates to who qualifies as a “student” within the meaning of Section 6363. Some confusion has apparently arisen by virtue of the wording of Annotation 550.1440 (2/26/68), which states that persons attending courses at a college qualify as students if they are formally enrolled therein while persons attending lecture series open to the general public without any requirement of enrollment do not qualify as students. This annotation covers a situation where a lecture series is offered where all a person needs to do to attend is to show up. If there is a requirement for the person to register with the school in order to attend the class, that person is a student within the meaning of Section 6363. You refer to extended education which offers seminars and workshops taught by professionals in various fields ranging from half-day seminars to multi-week classes. I assume that persons wishing to take these classes must submit an application which, at a minimum, would identify them by name and address, and are probably required to pay a fee. This constitutes enrollment and such a person is a student within the meaning of Section 6363. One of your questions is whether the qualification of a person as a student rests upon the type of course being offered, half-day seminar versus regular curriculum courses. The answer to this question is no, the important inquiry is whether the person must submit identifying information to the school in order to attend the class and not the type of class attended.

Your next questions relate to catering performed by S---. Among the entities for which S--- caters is an associated student organization which is a separate auxiliary entity funded from the allocation of student registration fees and incorporated mainly to provide services to students.

The catering services provided are paid by Associated Students directly to S---. You ask whether food paid for by Associated Students is exempt from sales tax because the funds for that payment are derived from student registration fees. We believe it appropriate to regard such sales as sales by the school (S---) to students. You also ask whether, when students and non-students attend catered functions paid for by Associated Students, the portion attributable to non-students is exempt as the providing of food to guests of students. BTLG Annotation 550.1280 (9/28/51) supports the conclusion that such sales are exempt sales to students.

You note that S---'s catering menu includes hot and cold foods. When only cold food is delivered, you ask whether this is considered a taxable meal. You also ask whether delivery and pickup charges are part of the taxable measure. You have provided us a copy of a memorandum from Tax Counsel Gary Jugum dated October 9, 1968. Mr. Jugum concluded that a caterer's providing of only cold cuts and salads constituted the providing of meals under the facts before him. Mr. Jugum noted that although sales of food products for human consumption are exempt from tax, the general rule is that meals are not exempt and he therefore concluded that the caterer's sales were subject to tax. From the information you have provided us, it appears that S--- would also be providing meals when catering even if only cold food is sold. If this is the case, such sales are subject to tax since they are not exempt under Section 6359 unless they are exempt for some other reason, such as exempt sales to students pursuant to Section 6363.

If the catering is subject to tax and if S--- is serving food, delivery charges are part of the taxable measure. (Reg. 1603(h).) Pickup charges are also taxable unless optional and separately stated. If S--- does not serve the food, it is theoretically possible that the parties could contract to have title to the food pass to the purchaser before the delivery is made, in which case the delivery charges, if separately stated and if not in excess of a reasonable charge, would not be subject to tax pursuant to Revenue and Taxation Code Section 6012(c)(7). However, such a contract would be a highly unusual catering contract and we therefore assume that delivery charges in the context of taxable sales of meals must be included in the taxable measure. Pickup charges may be excluded from the measure of tax only if separately stated and optional.

Your final question relates to catalog sales. S--- sells catalogs to students at the price set by the University's Chancellor. S--- purchases the catalogs ex-tax for 80% of the selling price and does not collect sales tax reimbursement on its sales of the catalogs to students. You ask:

“If S--- S--- is considered a ‘public school,’ are they still liable, as a separate entity, to pay sales tax on the purchase of the catalogs from --- --- State University as set forth in Regulation 1590(b)(2)? Can this transaction be considered an inter-company transfer not subject to sales tax?”

The relevant exemption is set forth in Section 6361.5:

“Any public or private school, school district or student organization is a consumer of, and shall not be considered a retailer within the provisions of this

part with respect to yearbooks and catalogs prepared for or by it and distributed to students.”

Under the specific factual circumstances you describe, we believe it appropriate to regard --- --- State University as the consumer of the catalogs which the University has prepared for it and which the University distributes to students by means of the S--- Book Store. The University arranges to have the catalogs prepared and has established a manner of distributing the catalogs to students under circumstances where it has control over the price of the catalogs. When the University transfers the catalogs through S--- for the limited purpose of distributions to students as you have described, we consider this part of the University's consumption. This means that no sale of tangible personal property occurs under the Sales and Use Tax Law and no tax is due. Of course, the sales of catalogs to the University are subject to tax.

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