

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

March 31, 1992

Ms. S--- S---
Students Accounts
C--- S--- H--- School
XXXX --- Drive
--- ---, CA XXXXX

RE: SR -- XX-XXXXXXX

Dear Ms. S---:

I am writing this to answer your letter of February 28, 1992, which you wrote to the State Board of Equalization. The Board referred it to the Legal Division for a response. You have asked several questions regarding sales made by, or on behalf of, your organization.

I. FACTUAL BACKGROUND

You set forth the factual backgrounds of your problem as follows:

“We are the Associated Student Body of C--- H--- S--- (‘ASCHS’), as part of our fund raising projects to help meet our school budget for sports and other school activities, we operate a snack bar and sell such items as fountain sodas, hostess cup cakes, candies and chips. We hold a seller’s permit and a tax I.D. Number. Should we collect tax on these items of 7.75 percent and pay that tax to the State Board of Equalization on our quarter reports which have been doing since July. Please advise us.

“Several of our clubs hold concession stands at our basketball games – should we pay taxes of 7.75 percent on those concessions? We also have Pepsi Cola Vending machines on our campus. Pepsi Cola collects the money from the machines, counts it and gives us a \$1.50 rebate on each case sold. Should we pay tax on the rebate received from Pepsi Cola?”

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. Tax Consequences to ASCHS

1. Snack Bar and Concession Stands.

Regulation 1597, interpreting and implementing Section 6361, provides that under certain circumstances, qualified youth organizations are the consumers and not the retailers of food products, candy, confectionery, snack foods, and tangible personal property created by members of the organization sold on an intermittent or irregular basis provided the profits from such sales are used solely and exclusively in the furtherance of the purposes of the organization. (Reg. 1597(d)(1).) ASCHS and the student clubs you mention are “qualified youth organizations” sponsored by or affiliated with C--- S--- H--- School. (Reg. 1597(d)(1)(A)(2).) Thus, under the regulation, when ASCHS or the clubs you mention buy the above items for the purpose of reselling them under the conditions set forth in the regulation, their purchases of these items are subject to tax. Their subsequent sales, as long as they occur under the conditions set forth in the regulation, are exempt from tax.

Your letter indicates that ASCHS operates a snack bar which appears to be open on a regular basis. It also indicates that other student clubs operate concession stands at CHS’ basketball games. We assume that ASCHS does not operate a stand at these games.

Since the snack bar is open regularly, its sales do not qualify for the above exemption. ASCHS is thus the retailer of the items it sells there and so is correct in paying tax and collecting sales tax reimbursement on its sales of the above products. The regulation defines “irregularly or intermittent” to include sales made at regularly-scheduled athletic events. (Reg. 1597(d)(1)(C).) As a result, the student clubs’ sales from their concession stands at the basketball games are exempt from tax.

ASCHS may buy the above products for its snack bar from its suppliers free of tax by giving them resale certificates which meet the requirements of Regulation 1668. However, as

discussed above, the student clubs are consumers of the items they sell at their stands at the games. Sales of such items to the clubs are subject to tax unless the items qualify as food products under Regulation 1602. Such products as carbonated beverages, Hostess cup cakes, candies and chips are excluded from the term "food products" under Regulation 1602(a)(2) & (4). If all of the products are purchased through a central agency at the school, then they may be purchased free of tax by that agency issuing the suppliers with resale certificates. The student clubs will then be liable for use tax measured by the purchase price of their purchases of non-exempt items.

2. Vending Machines.

You indicate that the vending machine operator sells the sodas and gives ASCHS a cut. We assume that the vending machine operator pays tax on his sales so that the \$1.50 "rebate" per case represents a cut of the after tax profits. Under that fact pattern, he and not ASCHS is the retailer of the sodas and so is required to possess a seller's permit. ASCHS therefore is not required to report and pay tax on these sales. This conclusion is specifically based on the assumptions stated above.

For your information, I have enclosed a copy of Regulation 1597 and 1668. 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

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encs.: Regs. 1597 & 1668