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October 6, 1993

X-----

Dear X-----:

This is in response to your letter of August 9, 1993, in which you ask for our opinion on the taxability of CO2 gas. You state:

"X----- is a frozen strawberry processor with processing facilities in X----- and X-----, California. We process many different styles of frozen strawberries. One pack style in particular, individually quick frozen (IQF), requires the use of CO2 gas in the packaging process. We have always paid sales tax on all purchases of CO2 gas.

"It has come to my attention that some processors of frozen fruit in the X----- area are able to buy CO2 gas for IQF processing and not pay sales tax on it. Apparently, their logic is that since the gas is incorporated into the frozen food product, the gas is more like a packaging cost or ingredient and therefore is part of the nontaxable food product. Accordingly, the sales and use tax regulations clearly state that these types of purchases would not be subject to sales tax."

Sales tax is imposed on all retailers measured by their gross receipts from retail sales of tangible personal property occurring in this state. (Rev. & Tax. Code § 6051.) When sales tax does not apply, use tax applies to the use of property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.)

Revenue and Taxation Code section 6016 defines tangible personal property as property that may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses. CO2 gas comes within this definition of tangible personal property. Therefore, unless the contrary is established, tax applies to your purchase of CO2 gas. (Rev. & Tax. Code §§ 6091, 6241.)

As noted above, retail sales are subject to tax. A retail sale is a sale for any purpose other than resale course of business. (Rev. & Tax. Code § 6007.) Thus a sale for resale is not subject to tax.

Regulation 1525(b) explains that a sale of tangible personal property which is purchased for the purpose of incorporating it into the manufactured article to be sold is a sale for resale.

Thus, tax does not apply. However, tax does apply to the sale of tangible personal property if the tangible personal property is purchased for use in manufacturing, producing, or processing tangible personal property and not for the purpose of physically incorporating it into the property. (Reg. 1525(a). In addressing Regulation 1525, the Court in Kaiser Steel Corp v. State Board of Equalization, 24 Cal.3d 188, 192, 193, stated that the courts have looked at the primary intent of the purchaser or primary purpose of the purchase to determine whether a sale is taxable. "If property is purchased as an aid in the manufacturing process, it is taxable despite the fact that some portion remains in the finished product " The Court stated, "chemicals used as catalysts or otherwise to produce a chemical or physical reaction such as the production of heat or the removal of impurities" are examples of property not purchased for the purpose of physically incorporating it into the manufactured article.

The CO2 acts as a freezing agent which assists in preserving the strawberries during the packaging process. X----- purchases CO2 for use in processing its quick-frozen strawberries and, although some of the CO2 may remain in the strawberries, the CO2 is not purchased or used for the purpose of physically incorporating it into the strawberries. Thus, X----- may not purchase CO2 for resale.

You also stated that some companies view the gas as a packaging cost. Revenue and Taxation Code section 6364 states in part:

"There are exempted from the taxes imposed, ... the gross receipts from sales of and the storage, use, or other consumption in this State of:

"(a) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container."

In Good Humor Co. v. State Board of Equal. (1957) 152 Cal.App.2d 873, Good Humor used dry ice for shipment of its ice cream, taking the position that it was a container and therefore Section 6364 rendered it exempt from tax. The Court disagreed, stating:

"[T]he main purpose of plaintiff's dry ice is to preserve the ice cream products through refrigeration; it is not intended to prevent physical damage to the produce or to be a means of containing the products. While it is true that dry ice provides safety by delaying natural deterioration, that is not the purpose for which packing materials are normally used. If the Legislature had intended that such an unusual packing material be included within the meaning of 'nonreturnable container,' it no doubt would have expressly so provided."

X-----'s CO2 use is analogous to the Good Humor dry ice use in that X-----'s main purpose, when it uses CO2, is to preserve the strawberries, not to prevent physical damage or to contain the strawberries during shipment. CO2 preserves the strawberries during the packaging process. Thus, CO2 is not considered a container, and the container exemption found in Section 6364 does not apply.

Since CO2 is tangible personal property and there are no applicable exemptions to your use of it, you may not purchase the CO2 extax for resale or by issuing an exemption certificate.

If you have any further questions, please feel free to write again.

Sincerely,

Rachel M. Aragon
Staff Counsel

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