


STATE BOARD OF EQUALIZATION

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February 10, 1993

Mr. A--- D---
A--- C---
P.O. Box XXXX
---, California XXXXX

Re: [No Permit Number]
Sales by Espresso Cart

Dear Mr. D---:

Your letter dated December 31, 1993, was forwarded to the Legal Division for response. You ask for written confirmation of verbal advice you indicate you received to the effect that your sales operations are not subject to sales tax.

You describe your business as follows:

"We plan to put an espresso cart in operation inside the lobby of an office building. There will be no table or chairs provided to sit down. Office workers will come to the carts, make their purchases and return to their offices or find somewhere to sit outside on cement or grass. All beverages to be served in paper cups."

You list the products you intend to sell as pastries, cookies, tea, coffee, espresso, cold juice or lemonade slush, and cold sandwiches and salads that you will buy pre-made from a deli for building customers. Apparently the building owner does not provide facilities for its workers to consume your products. It also appears that your hot drinks will sell for a separate price.

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 the

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.O.2d 201.] The taxpayer has the burden of showing that he clearly comes within the exemption." "Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption.

Section 6369, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered "food products." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) Effective December 1, 1992, "snack foods" are considered "food products with the result that sales of such products are exempt after that date.

However, under certain conditions, sales of food products are subject to tax. Sales of hot prepared food products are taxable. Although hot coffee is considered a "hot prepared food product," its sale for a separate price is exempt from tax unless otherwise specifically provided. (Reg. 1603(e).) Regulation 1603(f) provides that tax applies to sales of food products sold in a form suitable for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom to retailer contracts to furnish, prepare, or serve food products to others.

C. Tax Consequences.

It has long been our position that disposable glasses are not taxable "facilities" in and of themselves. We have assumed that the owner of the building does not provide tables and chairs for the consumption of your food products. Also, you apparently will be selling the hot drinks for a separate price. We conclude that your sales of food products from an espresso cart are exempt from tax. Your sales of coffee, tea and espresso will be subject to tax, however, if they are sold for a lump sum price with other food products - e.g., coffee and pastry for one price.

For your information, I have included a copy of Regulation 1603. 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

Mr. A--- D---

-3-

February 10, 1993
550.0090

JLW:es

Enc.: Reg. 1603